CORRECTED COPY

Supreme Court, U.S.
FILED
OCT 8 1999

Nº. 99-615

In The

Supreme Court of The United States

October Term 1999

PERINI CORPORATION

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

Petition For A Writ Of Certiorari
To The United States
Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ELI S. COHN*
K. RICHARD MARCUS
McDonough Marcus Cohn
Tretter Heller & Kanca, L. L. P
3 Park Avenue
New York, NY 10016
(212) 779-9700

Attorneys for Petitioner
*Counsel of Record

UNITED STATES SUPREME COURT DOCUMENT SERVICE.
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆888-453-2424

QUESTION PRESENTED FOR REVIEW

In an action for breach of a local government's contract for the construction of a waste water facility entered into in connection with the federal government's vast environmental procurement program, is long standing federal common law the rule of decision to interpret a federal regulation implementing the procurement policy of the United States when the regulation is silent as to the choice-of-law to be applied, where:

(a) the state law interpretation of the local government's contract frustrates and is in substantial conflict with the procurement policy of the United States;

(b) the United States is exercising its constitutional function in maintaining uniformity when it disburses funds to the local government in furtherance of its uniquely federal interest in its national procurement program;

(c) it is the procurement policy of the United States to secure the lowest price to construct facilities necessary to its procurement program and such policy is in conflict with the policy of the local government that causes contractors to raise their prices to perform such work and results in higher costs to the federal government;

(d) Congress has authorized and the regulation implementing the national procurement policy provides that it supersedes all conflicting provisions of the contract;

(e) the application of state law is in conflict with decisions of this Court, several circuit, district and state courts; and

(f) the Regulation did not provide a remedy but did provide that the contractor "shall" have the right to receive an "equitable adjustment" of the contract.

LIST OF PARTIES IN THE COURT BELOW

The parties before the Court are the same parties in the court below; Perini Corporation, plaintiff-appellant and The City of New York, defendant-appellee.

RULE 29.6 STATEMENT

The petitioner, Perini Corporation is a corporation whose shares are publicly traded on the American Stock Exchange. It has no subsidiaries.

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED FOR REVIEW..... i

LIST OF PARTIES IN THE COURT BELOW..... ii

RULE 29.6 STATEMENT..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... vii

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 1

U.S. CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT
POINT I
THE LOWER COURTS' DECISION TO APPLY STATE LAW CONFLICTS WITH CONTROLLING FEDERAL LAW AND FRUSTRATES IMPORTANT FEDERAL PROCUREMENT POLICIES. 8

(a) Federal Common Law is the Law of Decision to Interpret the Regulation Due to the Substantial Conflict Between the Procurement Policy of the City and that of the United States..... 8

(b) The Lower Courts' Decision is in Conflict with Decisions of this Court in U.S. v. Kimbell Foods, Inc. and U.S. v. Little Lake Misere Land Co., Requiring the Application of Federal Common Law as the Law of Decision in this Matter..... 12

(c) Breach of the Regulation's Mandate for an "Equitable Adjustment" Requires that Federal Common Law be the Law of Decision Herein..... 15

POINT II

THE LOWER COURTS' DECISION IS IN CONFLICT WITH IMPORTANT PRECEDENT SET BY THIS COURT REQUIRING THE APPLICATION OF FEDERAL COMMON LAW..... 16

(a) The Decision is in Conflict with Decisions of this Court in Clearfield Trust Co. v. U.S. and U.S. v. Allegheny County, Pa..... 16

(b) The Decision is in Conflict With This Court's Decision in Boyle v. United Technologies, Inc..... 20

(c) Courts of Appeal as Well as District and State Courts are Divided Over Whether Boyle Applies Solely to Military and National Security Matters..... 22

(d) The Decision Below is in Conflict with the Decision of this Court in City of New York v. F.C.C..... 24

POINT III

PURSUANT TO DECISIONS OF OTHER CIRCUITS AND NEW YORK LAW, FEDERAL COMMON LAW SHOULD ULTIMATELY BE APPLIED TO CONSTRUE THE REGULATION..... 26

POINT IV

THE DECISION BELOW WILL HAVE WIDE RANGING DETRIMENTAL CONSEQUENCES FOR THE FEDERAL, STATE AND LOCAL GOVERNMENTS AS WELL AS FOR PRIVATE CONTRACTORS..... 29

CONCLUSION..... 30

APPENDIX

United States Court of Appeals for the Second Circuit.....Apdx A - 1

United States District Court For the Souther District of New York.....Apdx B - 9

United States Constitutional Provisions, Statutes, Rules and Regulations.....Apdx C - 36

TABLE OF AUTHORITIES

PAGE NO.

CASES

A.H.A. General Constr. Inc. v. New York Housing Auth., 92 N.Y.2d 20, 677 N.Y.S.2d 9 (1998) 11

American Auto. Mfrs. Ass'n. v. Mass. Dept. of Environmental Protection, 163 F.3d 74, 86 Fn. 14 (1st Cir. 1998) 25

American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961) 21

Boyle v. United Technologies, Inc., 487 U.S. 500 (1988) ..... *passim*

Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.3d 41 ..... 26, 27

Bruce Constr. Corp. v. U.S., 324 F.2d 516, 518 (Ct. Cl. 1963) 10

C.H. Sanders, 903 F.2d at 118 16

Carley v. Wheeled Coach, 991 F.2d 1117, 1119 (3d Cir. 1993) 22

City of New York v. F.C.C., 486 U.S. 57, 63 (1988) 24, 25

Clearfield Trust Co. v. U.S., 318 U.S. at 367. .... 15, 16, 18, 19, 23

Foster Const. Co. v. U.S., 435 F.2d 873, 887 (Ct. Cl. 1970). 8

Francis v. INA Life Ins. Co., 638 F.Supp. 1117, 1118 (S.D.N.Y. 1986), aff'd, 809 F.2d 183 (2d Cir. 1987) ... 28

Grispo v. Eagle-Picher Ind., Inc., 897 F.2d 626 (2d Cir. 1990) 22

Hoel-Steffen Const. Co. v. U.S., 456 F.2d 760, 768 (Ct. Cl. 1972) 11

In re Massman Const. Co., 81-1 BCA 41387, 41393 (1971). 11

International Ass'n. of Independent Tanker Owners v. Locke, 159 F.3d 1220, 1226 (9th Cir. 1998) 25

Kaiser Industries Corp. v. U.S., 340 F.2d 322, 329 (Ct. Cl. 1965) 9, 10

Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 461 N.Y.S.2d 746, 749 (1983) 10

Linan-Faye Construction Co., 847 F. Supp. at 1198 . . . 26, 27

New SD, Inc. v. Rockwell Int'l Corp., 79 F.3d 953, 955 (9th Cir. 1996 21

Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir. 1990) 22

Perini Corporation v. The City of New York, (Sup. Ct. N.Y. Co. 1999, Index No. 60417/98) 7, 29

Philbrook v. Glodgett, 421 U.S. 707 (1975) 24, 25

Schiavone v. City of New York, (Sup. Ct. N.Y. Co. 1996, Index No. 5060/92). 27

Second Circuit Court of Appeals, 1999 WL376870, reported at 182 F.3d 901 (Table) 1

Sinclair Refining Co. v. Atkinison, 370 U.S. 195, 215 (1962) 25

U.S. v Kimbell Foods, Inc., 440 U.S. 715, 728 . . . . . 12, 14

U.S. v. Allegheny, 322 U.S. 174, 181(1944) 16, 17

U.S. v. Little Lake Misere Land Co., 412 U.S. 580, 592 (1973) 12, 13, 14, 15, 23

U.S. v. Seckinger, 397 U.S. 203, 209 (1970) 17, 18

United Contractors v. U.S., 368 F.2d 585, 599 (Ct. Cl. 1966) 9

United States District Court for the Southern District of New York, 18 F.Supp.2d 287 1

Westinghouse Elec. Corp. v. Garrett Corp., 437 F.Supp. 1301, 1329 (D. Md. 1977), aff'd, 601 F.2d 155 (4th Cir. 1996) 26

Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc., 164 F.3d 123, 127 (2d Cir. 1999) 12, 16

STATUTES

28 U.S.C. § 1254(1). 1

28 U.S.C. § 1332(a). 4

33 U.S.C. § 1251(a) 1, 6, 18

33 U.S.C. § 1361(a). 1, 6, 18, 23

33 U.S.C. § 1281(a) 1

40 C.F.R. § Part 33. 3

40 C.F.R. § 33.1030. 18

40 C.F.R. § 33.1030(1). 1

40 C.F.R. § 33.1030(a). 6

53 C.F.R. at 8073. . . . . 3, 19

U.S. Constitution Article VI, cl.2. . . . . 1, 24

MISCELLANEOUS

Historical Tables, Budget of the United States Government, Fiscal Year 1998 at 202-203. 2

New York's McKinney's Statutes, § 261. 28

PETITION FOR A WRIT OF CERTIORARI

Perini Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Second Circuit Court of Appeals, 1999 WL376870, reported at 182 F.3d 901 (Table) and an order denying a petition for rehearing en banc, are annexed at Appendix ("Apdx") A - 1.

The opinion of the United States District Court for the Southern District of New York, 18 F.Supp.2d 287, is annexed at Apdx B - 9.

STATEMENT OF JURISDICTION

The decision of the Second Circuit was entered on June 2, 1999. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Second Circuit by order entered August 5, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

U.S. CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution Article VI, cl.2; 33 U.S.C.§§ 1251(a), 1281(a) and 1361(a); and 40 C.F.R. § 33.1030(1), (3), are (a) germane to this matter and printed at Apdx C - 36.

STATEMENT OF THE CASE

In the past five years the United States has expended and/or committed in excess of One Trillion ($1,000,000,000) Dollars to state/local governments for construction programs that are of a national interest, i.e., programs for pollution control, highway improvement, affordable housing, etc. (the "Local Grant Program"). A similar amount is committed to the Program for the next five years[1]. The Federal Government in committing these substantial sums is exercising its constitutional function and has a substantial interest in these Programs.

In connection with procurement contracts entered into by contractors directly with the United States and those entered into under the Local Grant Program with local governments, in this case the City of New York, it is the policy of the United States to give an equitable adjustment to a contractor that encounters differing site conditions, changes to its work or suspensions of its work ("Unforeseen Conditions") that increase its costs. An equitable adjustment is a term of art in Federal Government procurement contracts, unknown under the City Contract, whereby the contractor is placed in the same economic position it would have occupied had there not been an Unforeseen Condition encountered. In this manner, the Federal Government pays the lowest price for the work as

---

[1]See Historical Tables, Budget of the United States Government, Fiscal Year 1998 at 202-243.

the contractor bids solely on the work to be performed without adding a contingency to its bid to compensate it for any Unforeseen Conditions that it may encounter.

To implement the policy of the United States, some of its agencies have adopted regulations containing standardized clauses providing that the contractor shall receive an equitable adjustment to compensate it for increased costs incurred by Unforeseen Conditions. Further, to insure that the Federal Government's policy will be followed, some regulations expressly provide that they supersede all conflicting provisions of the local government's contract.

The Federal Government's interest for uniformity in federal procurement matters is so strong that, "on March 12, 1987, President Reagan directed all Federal assistance awarding agencies to publish for state and local government grantees common regulations that adopt the Government - wide terms and conditions verbatim...." (53 F.R at 8073).

In the instant matter, Perini Corporation ("Perini") and the City entered into a procurement contract that was partially funded by the United States Environmental Protection Agency (the "EPA"). Pursuant to the Contract Perini agreed to perform work at the Coney Island Water Pollution Control Plant for $40,985,000.

The Contract provided that it "will be subject to Regulations contained in 40 C.F.R. Part 33 of the U.S. EPA Rules and Regulations." The Regulation was set forth at length in the Contract. It provided that Perini "shall" receive

an equitable adjustment for changes that cause it to incur increased costs (the "Changes Clause"). In addition, the Regulation provided that it "supersede[s] any conflicting provision of the agreement" (the "Supersession Clause").

During the course of construction, the City changed Perini's work causing it to suffer an out-of-pocket loss of approximately $4 million for performing work 2 years beyond the anticipated completion date of the Contract. When Perini received no response to its request for an equitable adjustment, it commenced this action to enforce the Regulation. Perini specifically pleaded in one of the counts of the complaint that its cause of action was brought under the Federal Regulation, pursuant to which it was entitled to, but did not receive an equitable adjustment.

Jurisdiction before the District Court was conferred by 28 U.S.C. § 1332(a). Perini is incorporated in the State of Massachusetts and there was complete diversity of citizenship between it and the defendant. The amount of the controversy exceeded $75,000. Although Perini additionally claimed the presence of federal question jurisdiction pursuant to the Regulation, such claim was rejected.

After issue was joined, Perini moved for summary judgment seeking an equitable adjustment and the City cross-moved for summary judgment alleging that Perini failed to give proper notice as required by the Contract.

Threshold to the court's Decision was whether to apply federal or state law to construe the Regulation. As the District

Court observed, if the liberal federal law applied, Perini would prevail as it was not required to give notice to the City of the changes that the City itself had directed as the City had actual knowledge of such changes. If state law applied however, then the strict interpretation of the City's standard Contract clauses given by state courts would be controlling and the City prevailed. The Contract's strict notice provisions, along with its no-damage-for-delay clause (the "No Damage Clause"), implement the City's policy not to pay for any increased costs incurred by the contractor due to Unforeseen Conditions. Pursuant to the City's policy, the contractor must add a monetary contingency to its bid to compensate it for Unforeseen Conditions. If there are no Unforeseen Conditions the contractor receives a windfall. If the Unforeseen Conditions encountered are beyond those estimated by the contractor in its contingency, it can be disastrous. In either event the City's policy results in a higher cost of construction, which cost is passed on to the Federal Government.

The courts below granted the City's motion and rejected Perini's arguments that federal law must apply based upon the significant conflicts between the Federal Government's and City's procurement policy, the Regulation's Supersession Clause, the presence of a uniquely federal interest, and President Reagan's direction for uniform rules of construction in the Local Grant Program.

In coming to their decision that New York State law applied, the courts below should not only have considered the

general rules of contract interpretation to construe the Regulation, but should also have considered that:

(i) The Regulation implements the comprehensive nationwide program of the United States for the construction of waste water treatment plants to help clean the environment throughout the states, see, 33 U.S.C. § 1251(a);

(ii) The Regulation was adopted pursuant to authority conferred by federal statute, see, 33 U.S.C. § 1361(a), and contained a supersession clause indicating Congress' intent that the contractor "shall" receive an equitable adjustment for increased costs caused by changes to its work, see, § 40 C.F.R. § 33.1030(a);

(iii) There is a significant conflict between the procurement policy of the United States and that of the City resulting in the cost of construction of the Local Grant Program to be higher when the City's policy is followed. The additional cost of the program is a uniquely federal interest of the United States;

(iv) Application of the states' strict construction to the Regulation, as opposed to the liberal construction given to it by federal precedent, frustrates specific objectives of the Local Grant Program by denying an equitable adjustment to a contractor for Unforeseen Conditions and causing the contractor to submit higher bid prices; and

(v) President Reagan issued a directive recognizing the need for a uniform rule in federal procurement programs throughout the United States. Such directive is intended to

avoid diversity in results by making the interpretation of identical construction clauses subject to the same law as opposed to the vagaries of the laws of several states.

Of paramount national importance is a pronouncement by this Court that when the United States expends substantial funds for its continuing national procurement program, it is exercising a constitutional function in which it has a uniquely federal interest, and when any state or local government's laws or policy frustrates, is aberrant or hostile, or stands as an obstacle to the accomplishment of the Federal Government's policy, such state law or policy must be displaced.

Petitioner's request for Certiorari should be granted as it presents three unsettled issues of national importance that are ripe for this Court's consideration:

(i) where the Federal Government expends substantial monies for its local government grant program, is federal common law the law of decision to interpret a regulation that implements such policy, where the regulation provides that it supersedes all conflicting provisions of the local government's contract, and where the Federal Government has directed that a uniform rule in its grant program is necessary. The Second Circuit's affirmance of Perini Corporation v. The City of New York, which answered the question in the negative and applied state law, is the lead case of decision on this issue in the United States;

(ii) it will resolve the conflict among circuit, district and state courts as to whether this Court's decision in Boyle

v. United Technologies, Inc., 487 U.S. 500 (1988), cited in over seven hundred cases, is applicable only to military and national security matters, as held by the courts below; and

(iii) it will set forth standards and instruction to lower courts and the national bar as to when and under what circumstances federal common law is applicable in a case.

ARGUMENT

POINT I

THE LOWER COURTS' DECISION TO APPLY STATE LAW CONFLICTS WITH CONTROLLING FEDERAL LAW AND FRUSTRATES IMPORTANT FEDERAL PROCUREMENT POLICIES

(a) Federal Common Law is the Law of Decision to Interpret the Regulation Due to the Substantial Conflict Between the Procurement Policy of the City and that of the United States.

The courts below failed to recognize two substantial conflicts between the procurement policy of the United States and that of the City requiring the application of federal common law in this matter.

The Federal Government's procurement policy has been aptly stated in Foster Const. Co. v. U.S., 435 F.2d 873, 887 (Ct. Cl. 1970):

> The starting point of the policy...is the great risk for bidders on construction projects...no one can ever know with certainty what will be found...whenever

> dependable information on the subsurface is unavailable, bidders will make their own borings or, more likely, include in their bids a contingency element to cover the risk. Either alternative inflates the costs to the Government.
>
> . . .
>
> The purpose of the [Changes]...clause is thus to take at least some of the gamble...out of bidding. Bidders...need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate biddings, without inflation for risks which may not eventuate. It pays for additional...work only when it is encountered....

See also, United Contractors v. U.S., 368 F.2d 585, 599 (Ct. Cl. 1966) wherein the court commented that the Government's procurement policy was, "to persuade contractors to calculate bids on the basis of the description contained in the [contract]. The rationale is served by allowing [the contractor] to recover an equitable adjustment because it had to deal with [Unforeseen Conditions]."

In Kaiser Industries Corp. v. U.S., 340 F.2d 322, 329 (Ct. Cl. 1965), the Court noted, "the very purpose [of the Federal Government's procurement policy] is to prevent bidders from adding high contingency factors [onto their bids].... Defendant's attempt to divest itself of all contractual responsibility...and throw the entire risk thereof upon the

contractor...cannot...be sustained."

Conversely, the City's procurement policy, as implemented by the Contract's No Damage Clause and its strict notice provisions is to exculpate itself from all increased costs. Such policy has been stated by the New York Court of Appeals in Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 461 N.Y.S.2d 746, 749 (1983):

> As is true of contracts generally, implicit in the present one was the obligation of fair dealing.... Even absent an exculpatory clause, this very well may have rendered the contractee's reasonably created delays acceptable. The clause here, therefore, might have little purpose if it were not to read to extend acceptability to a range of unreasonable delays as well. Manifestly, this interpretation is mandated by the [No Damage] clause's "unmistakable intent" that, as between these parties, the contractor rather than the [City] is to absorb damages occasioned by contractee - caused delay.

The City's policy is similar to that of other states and local governments. Such policy is exactly what Kaiser proscribed--contractually shifting the risk of all Unforeseen Conditions, including those caused by the City's unreasonable conduct upon the contractor. The Government's policy is to encourage the contractor to bid solely on the work required without increasing its bid for Unforeseen Conditions. If Unforeseen Conditions arise the Government will provide an equitable adjustment to make the contractor whole. See, Bruce Constr.

Corp. v. U.S., 324 F.2d 516, 518 (Ct. Cl. 1963) ("Equitable Adjustments...are simply corrective measures utilized when the Government modifies a contract.")[2] The City's policy is in direct conflict with the Government's policy. The City's policy requires that the contractor increase its bid to cover the costs of Unforeseen Conditions, whether such conditions are encountered or not, as the City will not pay any additional monies to the contractor. The City's procurement policy cannot be reconciled with that of the United States and stands as an obstacle to its accomplishment.

Further, the City's requirement that the Contract's notice provisions be strictly construed and making timely notice a "condition precedent" to recovery (see, A.H.A. General Constr. Inc. v. New York Housing Auth., 92 N.Y.2d 20, 677 N.Y.S.2d 9 (1998), is also in conflict with the liberal construction policy permitted under federal law. See, Hoel-Steffen Const. Co. v. U.S., 456 F.2d 760, 768 (Ct. Cl. 1972) ("[N]otice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally where the Government is quite aware of the operative facts.")

The District Court recognized that a significant conflict existed between how federal courts interpret the Regulation and how state courts interpret the Contract, "Federal

---

[2]See also, In re Massman Const. Co., 81-1 BCA 41387, 41393 (1971) (the purpose of an equitable adjustment is, "to leave the parties in the same position costwise and profitwise as they would have occupied had there been no change.")

law...construes the notice provisions of the Changes Clause liberally; thus, a contractee's...notice of...the claim excuses formal compliance....New York, on the other hand, requires strict compliance with notice provisions in public contracts as a condition precedent to the pursuit of compensation claims" (citations omitted).

The Second Circuit in Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc., 164 F.3d 123, 127 (2d Cir. 1999), noted that a significant conflict exists when the application of state law would run counter to a federal policy or interest. New York's procurement policy and strict notice requirements run counter to the Federal Government's procurement policy, its liberal notice requirements and the purpose of the Regulation.

The City's policy and its strict notice requirements frustrate the policy of the United States to give an equitable adjustment to contractors that incur increased cost due to Unforeseen Conditions. In the case at bar, if federal law applied implementing the Federal Government's policy, then Perini would have received an equitable adjustment. When state law was applied, Perini's action was dismissed.

(b) The Lower Courts' Decision is in Conflict with Decisions of this Court in U.S. v. Kimbell Foods, Inc. and U.S. v. Little Lake Misere Land Co., Requiring the Application of Federal Common Law as the Law of Decision in this Matter.

This case presents important questions of federalism and the appropriate role of federal common law in umpiring relationships between municipal authorities engaged in environmental projects and the Federal Government acting as a source of regulation and funding for those projects. In failing to apply federal common law to interpret federally mandated contractual provisions pertaining to a federally regulated environmental program, the courts below issued opinions which conflict with decisions of this Court as well as other state and federal courts.

In U.S. v. Little Lake Misere Land Co., 412 U.S. 580, 592 (1973) this Court addressed a choice-of-law issue where the United States acquired certain land under a federal regulatory program concerning migratory birds, and state law, if applicable, stood as a bar to the Federal Government's title.

In reversing the circuit court's decision to apply state law, this Court noted that the circuit court did not consider that the issue in question, "is one arising from and bearing heavily upon a federal regulatory program." The court observed:

> ...we have consistently acted on the assumption that dealings which may be `ordinary' or `local' as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case. In such cases, the Constitution or Acts of Congress `require' otherwise

than that state law govern of its own force.

The Court recognized that "the reasons which may make state law at times the appropriate federal rule" were "singularly inappropriate" in Little Lake Misere. Those reasons were stated in U.S. v Kimbell Foods, Inc., 440 U.S. 715, 728:

> Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." U.S. v. Standard Oil Co., 332 U.S. 301, 310....
>
> Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules....Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interest. (citations omitted)

Both reasons requiring the application of federal common law are present herein. The issues presented involve a federal Local Grant Program of national scope. The application of state law is hostile to the specific objectives of the Program, i.e., to construct waste water treatment facilities at the lowest possible cost. State law conflicts with, frustrates and stands as an obstacle to the procurement policy of the United States

in that it encourages the contractor to add a contingency to its bid for Unforeseen Conditions, resulting in higher construction costs to the Federal Government. Further, by their nature, vast national procurement programs, "are and must be uniform in character throughout the Nation". Otherwise, it subjects Congress' intent in maintaining uniformity when it disburses funds, to differing interpretations throughout the states as to the meaning of the same standardized construction clauses. Interpretations of the Regulation, pursuant to President Reagan's directive, are and must be uniform in character throughout the nation so that Congress' programs may achieve the same result.

Moreover, silence in a federal regulation as to the law of decision is no reason for limiting the reach of federal law. As noted in Little Lake Misere, 412 U.S. at 593, "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." "It is precisely when Congress has not spoken in an area comprising issues substantially related to an established program of government operation, that [this Court] directs federal courts to fill the interstices of federal legislation according to their own standards." Clearfield Trust Co. v. U.S., 318 U.S. at 367.

(c) Breach of the Regulation's Mandate for an "Equitable Adjustment" Requires that Federal Common Law be the Law of Decision Herein.

In Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc., 164 F.3d 123, 129, 130 (2d Cir. 1999), the circuit court discussed the effect of asserting a cause of action for an equitable adjustment, which it considered, "essentially, restitution for unjust enrichment-under federal common law", in connection with whether the district court had subject matter jurisdiction. In denying jurisdiction, the court commented, that in C.H. Sanders, 903 F.2d at 118, "we found subject matter jurisdiction because the equitable claim alleged by the plaintiff was based upon an alleged violation of a federal statute....(availability [of an equitable adjustment] is part of the federal common law relating to statutory violations.)" (brackets in original). Based upon Woodward, federal common law should be the law of decision herein as the City violated the Regulation which mandates that Perini "shall" receive an equitable adjustment.

POINT II

THE LOWER COURTS' DECISION IS IN CONFLICT WITH IMPORTANT PRECEDENT SET BY THIS COURT REQUIRING THE APPLICATION OF FEDERAL COMMON LAW

(a) The Decision is in Conflict with Decisions of this Court in Clearfield Trust Co. v. U.S. and U.S. v. Allegheny County, Pa.

Every dollar expended under the Local Grant Program is made pursuant to congressional authorization and under federal statute. Under such circumstances the procurement policy of the United States, which the City agreed to be subject to as a condition to the receipt of federal funds, cannot be limited or modified by state law. The Federal Government exercises a constitutional function in disbursing funds in its nationwide trillion dollar Local Grant Program and any question concerning the interpretation of the Federal Government's mandatory standardized construction clauses should be decided by federal law. As noted in U.S. v. Allegheny, 322 U.S. 174, 181(1944):

> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, all present questions of federal law not controlled by the law of any state (citations omitted).

Furthermore, as observed by this Court in U.S. v. Seckinger, 397 U.S. 203, 209 (1970), "[p]reliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract. [FN. 12] This conclusion results

from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution" (citations omitted).

Footnote 12 reads, "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties...all present questions of federal law not controlled by the law of any state" (citations omitted).

In the instant matter, Congress has enacted an extensive statutory scheme pertaining to the Local Grant Program concerning pollution control, 33 U.S.C. § 1251, et seq. As part of this statutory scheme, Congress has authorized the EPA to issue regulations necessary to proceed with the Program, 33 U.S.C. § 1361(a). Pursuant to this authority, the EPA has adopted the Regulation which sets forth the standardized construction clauses and a Supersession Clause providing that the Regulation supersedes all conflicting provisions of the Contract. The Regulation has been promulgated for official use in 40 C.F.R. § 33.1030, and mandates that such clauses be incorporated into all EPA grant contracts. The interpretation of the Regulation is controlled by federal law as it was adopted, "pursuant to authority conferred by federal statute and, ultimately, by the Constitution." See, U.S. v. Seckinger, supra.

In Clearfield Trust Co. v. U.S., 318 U.S. 363, 366, 367 (1943), this Court addressed the interest that the United States has in maintaining uniformity when it disburses its

funds. The court commented:

> when the United States disburses its funds or pays its debts, it is exercising a constitutional function or power....The application of state law...would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states.

In this connection, President Reagan directed that a uniform rule adopting the government - wide terms and conditions verbatim, be established. 53 FR at 8073.

The City's conflicting procurement policy and its strict interpretation of notice requirements and those of other state and local governments should not be permitted to vitiate the federal policy of encouraging a contractor to submit the lowest bid for the work through the granting of an equitable adjustment and its policy of liberal interpretation of the notice provisions. To permit the local government's conflicting contract to prevail "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states." (See, Clearfield Trust Co. v. U.S., supra).

Uniform national treatment, rather than diversified local disposition, is called for because of the distinctively federal nature of the vast Local Grant Program and because the question is primarily one of federal fiscal policy of no particular concern to the local governments or their citizens.

(b) The Decision is in Conflict with This Court's Decision in Boyle v. United Technologies, Inc..

This Court, in Boyle v. United Technologies, Inc., 487 U.S. 500, 505-506 (1988), discussed what constitutes a uniquely federal interest in procurement matters. The Court commented that the Government has a uniquely federal interest in connection with "the civil liabilities arising out of the performance of federal procurement contracts". Mr. Justice Scalia noted, "We think the reasons for considering these closely related areas to be of 'uniquely federal' interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts."

The Court further observed that the fact that the Federal Government is not a party to the contract, as is the case herein, does not limit its uniquely federal interest in connection with third-party contracts containing Government procurement provisions. The Court held, "...it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one--even though the dispute is one between private parties." 487 U.S. at 506.

In explanation of why a uniquely federal interest arises in an action between private parties, the Court commented that, "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the

interests of the United States will be directly affected." 487 U.S. at 507. The Court further commented that, "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingency liability for the Government ordered designs." 487 U.S. at 511-512.

Finally the Court concluded that state laws that hold the contractor liable for Unforeseen Conditions, by exculpatory and other clauses present a "significant conflict" with federal policy and must be displaced, "...state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." 487 U.S. at 512. See also, New SD, Inc. v. Rockwell Int'l Corp., 79 F.3d 953, 955 (9th Cir. 1996); and American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961).

The City's policy significantly conflicts with the Federal Government's policy by requiring the contractor to raise its price and add a contingency to its bid to compensate it for Unforeseen Conditions. This ultimately increases the costs to the Federal Government for the Local Grant Program under circumstances where no Unforeseen Conditions arise. Accordingly, "the interests of the United States will be directly affected" by the higher construction costs of the

Local Grant Program caused by the City's policy not to grant an equitable adjustment to contractors that incur increased costs due to Unforeseen Conditions.

There is therefore a significant conflict present between an identifiable federal policy and the operation of state law, requiring state law to be displaced.

(c) Courts of Appeals as Well as District and State Courts are divided over Whether Boyle Applies Solely to Military and National Security Matters.

The courts below refused to consider the principles decided in Boyle by apparently concluding that the theories espoused therein were only applicable to matters involving the military or national security. Supporting such conclusion are: Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450 (9th Cir. 1990); Grispo v. Eagle-Picher Ind., Inc., 897 F.2d 626 (2d Cir. 1990), district courts in Kansas, New York, Hawaii and various state courts.

However, the Third, Seventh and Eleventh Circuit, district and state courts hold differently. As noted in Carley v. Wheeled Coach, 991 F.2d 1117, 1119 (3d Cir. 1993):

> In Boyle, the Court specifically applied the government contractor defense in the context of a military procurement contract....The Court, however, did not address whether the government contractor defense is also available to manufacturers of nonmilitary products, an issue which has generated a significant split in authority. [FN1] We conclude that the reasoning of

Boyle applies to both military and nonmilitary contractors.

Footnote 1 in part reads:

The following opinions have held that the government contractor defense is available to all manufacturers: Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986); Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985); Johnson v. Grumman Corp., 806 F.Supp. 212, 217 (W.D.Wis. 1992); Price v. Tempo, Inc., 603 F.Supp. 1359, 1361-62 n.3 (E.D.Pa. 1985); In re Chateaugay Corp., 132 B.R. 818, 823-27 (Bankr. S.D.N.Y. 1991), rev'd, 146 B.R. 339 (S.D.N.Y. 1992); Vermeulen v. Superior Court of Alameda County, 204 Cal.App.3d 1192, 251 Cal.Rptr. 805, 809-10 (1988); McDermott v. TENDUN Constructors, 211 N.J.Super. 196, 511 A.2d 690, 696 (App.Div.), cert. denied, 107 N.J. 43, 526 A.2d 134 (1986).

Justice Scalia's opinion for the Court in Boyle made clear that the principles of Little Lake Misere, Allegheny County, Pa., and other progeny of Clearfield Trust survive today, even under the Court's current view of federalism. The Supreme Court's intervention is necessary in order to eliminate confusion in the lower courts concerning the reach of Boyle outside of the military contractor context as well as the vitality of other precedents decided therein holding that federal common law is the law of decision to interpret the Regulation.

(d) The Decision Below is in Conflict with the Decision of this Court in City of New York v. F.C.C.

This Court in City of New York v. F.C.C., 486 U.S. 57, 63 (1988), held that a federal agency's regulation that contained a supersession clause would preempt state law. The Court observed, "When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind....U.S. Const. Art. VI, cl. 2."

In holding that an agency's regulations are the "supreme law of the land", the Court commented, "The phrase `laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization."

As noted in Philbrook v. Glodgett, 421 U.S. 707, 713 (1975), "[i]n expounding a statute, we must not be guided by a single sentence, but look to the provisions of the whole law, and to its objective and policy....Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will."

Here Congress' intent is codified in the Changes and Supersession Clauses, which set forth EPA's objective and policy that the contractor "shall" be entitled to an equitable adjustment. Such policy supersedes all conflicting provisions

of the City's Contract.

Further, as commented by this Court in Sinclair Refining Co. v. Atkinison, 370 U.S. 195, 215 (1962), "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers where congressional interest is discernible -- and here it seems crystal clear -- we must give effect to that interest."

Contrary to Philbrook and Sinclair, the courts below refused to look to the objectives of Congress' policy as implemented by the EPA requiring a liberal interpretation of the Regulation's notice and changes clauses and improperly gave effect to the strict contractual clauses of the City contract implementing its conflicting procurement policy.

The Decision is in conflict with recent decisions of the First and Ninth Circuits, in American Auto. Mfrs. Ass'n. v. Mass. Dept. of Environmental Protection, 163 F.3d 74, 86 Fn. 14 (1st Cir. 1998) ("A federal agency acting within the scope of the authority delegated to it by its enabling act, can preempt state and local action"); and International Ass'n. of Independent Tanker Owners v. Locke, 159 F.3d 1220, 1226 (9th Cir. 1998) ("Generally, an administrative agency's regulations have preemptive effect whenever Congress has authorized the agency to enact such regulations, not merely when Congress expressly has authorized the agency to preempt state law"), each citing City of New York v. F.C.C. with approval.

POINT III

PURSUANT TO DECISIONS OF OTHER CIRCUITS AND NEW YORK LAW, FEDERAL COMMON LAW SHOULD ULTIMATELY BE APPLIED TO CONSTRUE THE REGULATION

The courts below cited to Linan-Faye Const. Co., Inc. v. Housing Auth. of the City of Camden, 49 F.3d 915 (3rd Cir. 1995) and Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987) as authority for their decision that state law is applicable to construe the Regulation. But see, Westinghouse Elec. Corp. v. Garrett Corp., 437 F.Supp. 1301, 1329 (D. Md. 1977), aff'd, 601 F.2d 155 (4th Cir. 1996). In both cases, after holding that state law applied to construe similar regulations (neither of which appears to contain the Supersession Clause), the courts looked to state law, and finding that there were no state law cases that interpreted the particular federal clauses, both circuits looked to and applied federal common law.

The Court in Linan-Faye had before it the interpretation of a termination clause contained in a contract pursuant to a federal regulation. The court held that it would look to federal common law to construe the clause:

> It is undisputed that there are no cases in New Jersey construing the effect of termination for convenience clauses. It is also undisputed that there are numerous federal cases dealing specifically with termination for convenience clauses....Therefore, as the district court

> stated, "courts in New Jersey would recognize that where the parties have incorporated a particular clause pursuant to federal regulation, they do so against the backdrop of federal case law addressing the clause." Linan-Faye Construction Co., 847 F. Supp. at 1198. Accordingly, we align ourselves with the district court in its determination that if New Jersey law were to apply, New Jersey courts would look to this rich body of federal common law concerning the termination for convenience doctrine....

49 F.3d at 921-922.

In addressing whether to apply state or federal law to construe an EPA notice provisions similar to that under consideration herein, the court in Brinderson held that the notice provision of the EPA's standardized construction clauses should be liberally interpreted pursuant to federal precedent. The court noted, "We are confident that the Supreme Court of Virginia, if called upon to construe or apply this federally mandated provision, would look to the existing body of precedents. That collection of precedents is federal...." 825 F.2d at 44-45.

If the courts below had looked to the law of New York, the courts would have determined that there are no New York appellate court cases that construe the precise Regulation[3],

---

[3]There are two New York lower court cases that have construed the precise Regulation under consideration herein, Schiavone v. City of New York (Sup. Ct. N.Y. Co. 1996, Index

only cases that construe the strict notice and No Damage Clauses of the Contract. If the courts below would have applied New York law[4], the courts would have looked to federal precedent to interpret the Regulation.

See, also, Francis v. INA Life Ins. Co., 638 F.Supp. 1117, 1118 (S.D.N.Y. 1986), aff'd, 809 F.2d 183 (2d Cir. 1987), holding, "When the law of the forum state does not address the precise issue, it is the Court's task to reach the correct result by looking to the decisions of other jurisdictions."

No. 5060/92) and Perini v. City of New York (Sup. Ct. N.Y. Co. 1999, Index No. 60417/98). Both hold that federal law applies to construe the Regulation. As noted in Perini, "A contrary holding would completely vitiate the [standardized construction] clause, and in derogation of the Federal policy mandating such clauses in federally funded projects, encourage subsequent bidders to increase their bids in order to cover the risk of high subsurface water. That precisely is what the [equitable adjustment] clause is meant to avoid."

[4]New York's McKinney's Statutes, § 261 provides in part, "Construction of foreign statutes. Where courts of New York find it necessary to construe the statutes of another state, they are bound to follow the construction which the courts of the other state have placed upon its laws....In the interpretation of a federal statute, the construction enforced by federal courts will be controlling.

POINT IV

THE DECISION BELOW WILL HAVE WIDE RANGING DETRIMENTAL CONSEQUENCES FOR FEDERAL, STATE AND LOCAL GOVERNMENTS AS WELL AS FOR PRIVATE CONTRACTORS

There are no other circuit courts that have held that state law applies to construe a federal regulation under circumstances where state law had not previously interpreted that precise federal regulation.

The Second Circuit's affirmance has made Perini Corporation v. The City of New York the lead case of decision in the United States standing for the proposition that the exculpatory and strict construction provisions of a local government's contract will preempt the Federal Government's mandate of granting an equitable adjustment to the contractor for Unforeseen Conditions. Without an equitable adjustment, contractors must raise their bid price to cover the contingency of increased costs incurred for Unforeseen Conditions. These increased costs will be passed on and paid for by the Government. The higher cost to the Federal Government for its procurement programs is specifically what this Court has found to be repugnant to controlling law.

This Court's intervention is now necessary so that Congress, states, municipal governments, and private contractors may have clear guidance on the appropriate role

of state and federal law in the delicate balance among the competing spheres of law-making authority in our federalist system in connection with the Government's Local Grant and Procurement Programs.

CONCLUSION

Based upon the foregoing it is respectfully requested that Perini's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Eli S. Cohn*
K. Richard Marcus
Counsel for Petitioner
McDonough Marcus Cohn Tretter
Heller & Kanca, L.L.P.
3 Park Avenue
New York, New York 10016
(212) 779-9700

*Counsel of Record

Dated the ___ day of October, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
Acting Clerk

File Stamped
/s/ Aug 5, 1999

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse Foley Square, in the City of New York, on the /s/5th day of August one thousand nine hundred and ninety-nine.

Perini Corporation

Plaintiff-Appellant,

v

Dkt No: 98-9150

City of New York

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Perini Corporation.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

By: /s/ Beth J. Meador/ah
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of June one thousand nine hundred and ninety-nine.

Present: Honorable John M. Walker,
Honorable Pierre N. Leval,
Honorable Rosemary S. Pooler,
Circuit Judges.

Perini Corporation,

Plaintiff-Appellant,

-v.-

City of New York, (Coney Island, WPCP, WP-287),

Defendant-Appellee.

No. 98-9150

Appearing for Appellant: Eli Cohn, McDonough, Marcus, Cohn, Tretter, Heller & Kanca, New York, N.Y. (K. Richard Marcus, of counsel, on the brief).

Appearing for Appellee: Dona B. Morris, Assistant Corporation Counsel of the City of New York, New York, N.Y. (Michael D. Hess, Corporation Counsel of the City of New York, Francis F. Caputo, Lewis S. Finkelman, John de P. Douw, of Counsel, New York, N.Y., on the brief).

Appeal from the United States District Court for the Southern District of New York (Scheindlin, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED**.

Plaintiff Perini Corporation ("Perini") appeals an order and resulting final judgment of the United States District Court for the Southern District of New York (Scheindlin, J.) that denied Perini's motion for summary judgment and granted defendant City of New York's ("City's") motion for partial summary judgment.

Perini entered into a contract with the City that obligated Perini to upgrade and expand the structures and equipment at the Coney Island Water Pollution Plant in exchange for approximately $41 million. Because the United States Environmental Protection Agency ("EPA") provided fifty-five percent of the funding for the project, the contract contained certain EPA mandated provisions. The first of these, the "Supersession Clause," provided:

> The recipient and the contractor agree that this and other appropriate clauses [from the applicable federal regulations] apply to that work eligible for EPA assistance to be performed under this agreement and that these clauses supersede any conflicting provisions of this agreement.

A second clause, the "Changes Clause," obligated the City to make an "equitable adjustment" in the contract

price if a change order it issued caused Perini to incur additional costs or increased the time required to complete the contract. The Changes Clause also required that Perini, as a precondition for claiming an equitable adjustment, "within 30 days after receipt of a written change order . . . submit to the [City] a written statement setting forth the general nature and monetary extent of such claim ."

The contract also contained a choice-of-law clause mandating the use of New York law to interpret the contract and a clause requiring strict compliance with all notice requirements.

The City issued many change orders, which allegedly caused Perini substantial direct and indirect damages. At various times, Perini notified the City that it had incurred or would incur damages as a result of the change orders.

Because the parties were unable to agree on payment for the change orders, Perini sued. Perini and the City negotiated lump sum payments for the direct costs. Perini then sought summary judgment establishing the City's liability on Perini's third cause of action, which requested an equitable adjustment of $16 million for the indirect damages.

The City cross-moved for summary judgment, arguing, among other things, that Perini failed to comply with the notice requirements of the Changes Clause. Perini responded that federal law governed interpretation of the Changes and Supersession Clauses and that federal courts

and agencies have construed the notice requirements of the Changes Clause liberally.

The district court found that (1) state law governed interpretation of the Changes Clause; (2) state courts would construe the Changes Clause strictly; and (3) Perini's attempts at notice did not comply with the contractual requirement. See Perini Corp. v. City of New York, 18 F. Supp.2d 287, 293, 295-96 (S.D.N.Y. 1998).

We agree with the district court that New York law governs interpretation of the Changes Clause. See Linan-Faye Constr. Co. v. Housing Auth. of Camden, 49 F.3d 915, 919-21 (3d Cir. 1995) (holding that state law governs construction of contract terms despite use of federal funds for project and adoption of forms authorized by federal agency); Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41, 44-45 (4th Cir. 1987) (stating that court was "not persuaded" by contention that federal law controlled construction of federally mandated clause in contract but following federal law because state courts would follow it in the absence of controlling state authority). Moreover, we perceive no conflict between the Changes Clause and the clauses requiring strict construction of notice requirements and the application of New York law. Therefore--contrary to Perini's argument--the Supersession Clause does not require that we ignore Perini's contractual agreement that (1) it would comply strictly with the notice requirements of the Changes Clause and (2) New York law would govern interpretation of the

contract. We have examined each of the documents that Perini claims constitute the notice required by the Changes Clause. Most are untimely, and those that are arguably timely did not adequately inform the City of "the monetary extent" of the damages claimed as the result of a particular change order as required by the Changes Clause.

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

PERINI CORPORATION, Plaintiff,

v.

The CITY OF NEW YORK, Defendant.

No. 97 Civ. 4808(SAS).

United States District Court,

S.D. New York.

Aug. 11, 1998

AMENDED OPINION AND ORDER

SCHEINDLIN, District Judge.

Plaintiff Perini Corporation ("Perini") filed a Complaint on June 24, 1997, asserting claims for multiple breaches of contract. On November 17, 1997, Perini moved for partial summary judgment on its third cause of action, which seeks an equitable adjustment for increased costs associated with the issuance of "change orders" on its contract with defendant City of New York ("City"). On January 6, 1998, defendant opposed Perini's motion and crossmoved for partial summary judgment on the same cause of action.

I. Legal Standard for Summary Judgment

A motion for summary judgment may be granted only if "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c)*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the burden of identifying evidence that demonstrates the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997). Once such evidence is identified, the non-movant must set forth specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505 (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-movant on a material issue of fact, summary judgment is improper. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997).

In determining whether summary judgment should be granted, the court resolves all ambiguities and draws all reasonable inferences against the moving party. *See D'Amico v. City of New York*, 132 F.3d 145, 148 (2d Cir. 1998). However, the moving party is not required to affirmatively disprove unsupported assertions made by the non-movant, *see Celotex*, 477 U.S. at 323, 106 S.Ct. 2548, and if the evidence presented by the non-movant is "merely

colorable, or is not significantly probative, summary judgment may be granted." *Scotto v. Almenas*, 143 F.3d 105 (2d Cir.1998) (quoting *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. 2505). The court must also examine "the substantive law applicable in the underlying litigation since that law dictates which facts are material." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir.1993) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505).

When both parties move for summary judgment, "a district court is not required to grant judgment as a matter of law for one side or the other. 'Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993) (quoting *Schwabenbauer v. Board of Educ.*, 667 F.2d 305, 314 (2d Cir. 1981)). However, where the material facts relevant to the disposition of both plaintiff's and defendant's motions are largely undisputed, both motions may be decided simultaneously. *See Turner v. General Motors Acceptance Corp.*, 980 F.Supp. 737, 739 (S.D.N.Y.1997) (citing *Heublein* for the proposition that cross-motions are evaluated independently, but deciding motions together where material facts are not in dispute).

II. Factual Background

The following facts are not disputed unless

otherwise indicated. On or about December 21, 1993, Perini and the City entered into a binding construction contract, designated "Contract 20G," pursuant to which Perini agreed to upgrade and expand the structures and equipment at the Coney Island Water Pollution Plant (the "Project") for $40,985,000. *See Plaintiff's Statement of Material Facts Pursuant to Local Civil Rule 56.1* ("Pl.'s 56.1") at ¶¶ 1-2; *Defendant's Statement of Material Facts Pursuant to Local Civil Rule 56.1* ("Def.'s 56.1") at ¶¶ 1-2; Complaint at ¶ 7.

A. Contract Provisions

An E.P.A. grant funding 55% of the Project required the incorporation of federal regulation 40 C.F.R. Chapter 1, Subchapter B, including 40 C.F.R. § 33.1030(3)(d) ("Changes Clause") and 40 C.F.R. § 33.1030(1) ("Supersession Clause"), into Contract 20G. *See Affidavit of Joseph Terracciano, Director of Revenue and Claims for the Department of Environmental Protection of the City* ("Terr.Aff.") at ¶¶ 5-7; Terr.Aff., Ex. D; Plaintiff's Memorandum of Law ("Pl.'s Mem.") at 1. The Changes Clause provides that an owner may by written order modify the contractor's work under the contract. If such a change "causes an increase or decrease in the contractor's cost. . . . an equitable adjustment shall be made and the contract modified in writing accordingly." In order "to assert a claim for an equitable adjustment under this clause,. . .[a contractor] must, within 30 days after receipt of a written

change order. . .submit to the owner a written statement setting forth the general nature and monetary extent of such claim." The Supersession Clause provides that the "clauses [under 40 C.F.R. § 33.1030, including the Changes Clause,] supersede any conflicting provisions of this subagreement."

In addition to these federally mandated clauses, Contract 20G includes standard contract provisions that provide for the issuance of contract changes (Article 25), determination of methods of payment (Article 26), and notice and documentation of claims (Articles 27 and 54). Article 25, "Contract Changes," states: "The Contractor shall be entitled to a price adjustment for extra work performed pursuant to a written change order. . . .Any Construction Contract increase. . .that cumulatively exceed[s] the greater of 10% or $50,000 shall be approved, in writing, by the Office of Construction." City's Cross-Motion for Partial Summary Judgment ("City's C-M"), Ex. A at p. 44. The computation of compensation for extra work performed pursuant to change orders issued by the City is determined under Article 26, "Methods of Payment for Extra Work," by either applicable unit prices, a "cost plus a percentage" method, or a negotiated payment. *Id.* at pp. 45-46. Article 27, "Disputed Work, Determination or Order," sets forth notice and documentation requirements:

> If the Contractor shall also claim to be sustaining damages by reason of any act or omission of the City or its agents, [it] shall within five (5) days after the sustaining of

> such damage, notify the Commissioner in writing and within (30) days thereafter. . . submit to the Commissioner verified detailed statements of the damages sustained together with documentary evidence of such damages. On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist.

Id. at p. 46. Article 54 further mandates strict compliance with notice provisions: "No claims against the City for damages for breach of Contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims as have been herein provided." *Id.* at p. 73.

B. Change Orders

The City issued change orders (1) modifying tile replacement of six existing 48-inch valves with new 54-inch valves, (2) modifying the rehabilitation of the existing main sewer pump motors, and (3) following the scheduled completion date of September 13, 1996. *See Pl.'s 56.1* at ¶¶ 6-15, 26; *Def.'s 56.1* at ¶¶ 6-15, 26. The change orders on the valve and motor work addressed problems encountered in Perini's performance of the contract, while the "PostCompletion" orders addressed miscellaneous changes

to Perini's work after September 13, 1996.

First, problems arose regarding the valve work when the designated manufacturer, Crane, declined to manufacture them according to contract specifications. *See Supplemental Affidavit of Slavko Pudar, Plaintiff's Engineer* ("Pudar Supp. Aff.") at ¶ 15; *Reply Affidavit of James H. Martinez, Defendant's Engineer* ("Mart. Reply Aff.") at ¶ 4; *Pudar Aff., Ex. E* at unnumbered pp. 1-2. In response to this problem, the City modified the valve specifications by letter dated June 28, 1994 and issued Change Orders 20G-33 ("Improvements to the Main Sewage Pump Inlet Valve Operators") on July 21, 1995, and 20G-42 ("Modifications at the Main Sewage Pump Gate Valve Actuator Platforms") on January 30, 1996. *See Pudar Aff., Ex. D* at unnumbered pp. 1-7 and *Ex. E* at unnumbered pp. 4-6; *Pudar Supp.Aff.* at ¶ 29. The City also eliminated Perini's obligation to install three of the valves required by Contract 20G. *See Mart.Aff.* at ¶ 18.

Perini claims that it notified the City by letters dated February 18, April 25 and July 11, 1994, of increased costs caused by these change orders. *See Pudar Supp.Aff.* at ¶¶ 29, 29(a). The February 18, 1994 letter requested a meeting to discuss the valve specifications in light of Crane's refusal to produce the valves as specified. *See Affidavit of Zohrab B. Marashalian, President of Plaintiff's Metro Division ("Marash.Aff."), Ex. 5* at unnumbered p. 1. In its April 25, 1994 letter, Perini informed the City that it anticipated both a delay from the City's rejection of Crane's alternative

design and a need to request a time extension in the future pursuant to Article 11 of Contract 20G. *Id.* at unnumbered pp. 2-3. In the July 11, 1994 letter, Perini stated that "[w]hen the true costs are determined for this redesign [of the valves] we will then address that issue along with the appropriate lost time." *Id.* at unnumbered p. 4.

A second problem arose when repairs to the motors exceeded the budget provided in the contract. *See Mart.Aff.* at ¶ 20. The City issued Change Orders 20G-58 ("Improvements and Installation of Spare Main Sewage Pump Motor") on January 16, 1997, 20G-60 ("Additional Repairs to Main Sewage Pump (MSP) Motor Nos. 2 thru [sic] 6") on January 16, 1997, and 20G-68 ("Emergency Repairs and Improvements to Spare Main Sewage Pump Motor S/ N-163") on April 15, 1997. *See Marash Aff., Ex. 8* at unnumbered pp. 1-6; *Pudar Aff., Ex. C* at unnumbered pp. 37-39. The City also canceled all contract and change order work on three of the motors by letter dated June 6, 1997. *See Marash.Aff., Ex. 8* at unnumbered p. 11; *Mart. Aff.* at ¶ 21.

Perini claims that it notified the City by letters dated June 26, July 1, October 4, November 8, November 20 and November 25, 1996, and January 28, March 4, and March 17, 1997, of its increased costs resulting from these change orders.[1] *See Pudar Supp.Aff.* at ¶¶ 29, 29(b). In the

---

[1]In its first submission, Perini does not claim that the letters dated November 8 and November 20, 1995, or the letters dated October 4, 1996 and March 4, 1997 provided notification to

June 26, 1996 letter, Perini discussed rehabilitation of the motors and a delay in the work schedule, and requested either the elimination of work on the motors or the issuance of a time extension and change order. *See Marash. Aff., Ex. 7* at unnumbered pp. 1-3. The July 1, 1996 letter requested compensation for continuing delays and provided a breakdown of "additional costs which have been and will continue to be incurred in order to accelerate the completion of the remaining pumps," including overhead and profit. *Id.* at unnumbered pp. 4- 9. In the September 3, 1996 letter, Perini asked the City to issue a change order for $1,341,578 in order to compensate it for costs it incurred in rehabilitating the motors.[2] *See Pudar Supp.Aff., Ex. O.* In the October 4, 1996 letter, Perini also requested

---

the City of its increased costs resulting from change orders modifying work on the motors; instead, it claims in an affidavit submitted in November 1997 that the latter two letters notified the City of increased costs resulting from change orders issued subsequent to the scheduled completion date. *See Marash.Aff.* at ¶ 18. However, in an affidavit submitted in April 1998, Perini claims for the first time that these letters constituted notice of increased costs caused by modification of work on the motors. *See Pudar Supp. Aff.* at ¶ 29.

[2]Perini does not directly refer to this letter to support notification regarding increased costs in the motor work, although it does allege that this letter gives notice of "the approximate monetary extent" of its claim. *Supplemental Affidavit of K. Richard Marcus, Plaintiff's Attorney ("Marcus Supp.Aff.")* at ¶ 30.

compensation of $3,771,615 for the increased costs incurred as a result of numerous difficulties it encountered during contract performance in general, including the valve replacement and motor improvements. *See Marash. Aff., Ex. 9* at unnumbered pp. 1-8. The November 8, November 20 and November 25, 1996 letters reiterate requests for reports on the deficiencies of one of the Motors. *See Marash.Aff., Ex. 7* at unnumbered pp. 12-15. In the January 28, 1997 letter, Perini informed the City of the motor repair vendor's refusal to warranty its work and requested further direction. *Id.* at unnumbered pp. 16-17. In the March 4, 1997 letter, Perini requested an equitable adjustment of $11.6 million as compensation for increased costs resulting from changes to Contract 20G, including the valve design and the specifications providing for the motor rehabilitation. *See Marash. Aff., Ex. 9* at unnumbered pp. 9-10. In the March 17, 1997 letter, Perini demanded that change orders regarding its work on the motors be finalized, including "all outstanding costs." *See Marash.Aff., Ex. 7* at unnumbered pp. 18-19.

The City also issued a number of change orders subsequent to Contract 20G's scheduled completion date of September 13, 1996. *See Pl.'s 56.1* at ¶ 26; *Def.'s 56.1* at ¶ 26. The following change orders were issued between September 23, 1996 and September 23, 1997: 20G-53, dated September 23, 1996; 20G-54, dated September 23, 1996; 20G-55, dated October 9, 1996; 20G-56, dated October 9, 1996; 20G-57, dated October 2, 1996; 20G-58,

dated January 17, 1997; 20G-59, dated December 23, 1996; 20G-60, dated January 16, 1997; 20G- 61, dated January 16, 1997; 20G-62, dated January 8, 1997; 20G-63, dated January 28, 1997; 20G-64, dated February 12, 1997; .20G-65, dated February 18, 1997; 20G-66, dated April 11, 1997; 20G-67, dated April 4. 1997; 20G-68, dated April 15, 1997; 20G-69, dated August 12, 1997; 20G-70, dated prior to May 19, 1997;[3] 20G-71, dated September 23, 1997. *See Pudar Aff., Ex. C.* Perini asserts that it notified the City of its claims arising from these change orders by letters dated October 4, 1996 and March 4, 1997, as well as its Notice of Claim and complaint dated June 24, 1997. *See Pudar Supp.Aff.* at ¶ 29; *Marash Aff.* at ¶ 18(c).[4]

It is undisputed that Perini and the City have negotiated lump sum payments for at least the direct costs associated with these change orders. *See Pl.'s Reply Mem.*

---

[3]Change Order 20G-70 was received by Perini on May 19, 1997; the issuance date does not appear on the document.

[4]Perini further alleges that the following change orders also caused delays and increased its costs: 20G-46 ("Additional Repairs to Main Sewage Pump Motor No. 1 (Serial No. 142)"), dated April 23, 1996; 20G-47 ("Main Sewage Pump Venting System Modifications"), dated May 30, 1996; and 20G- 48 ("Electrical Disconnect Switches for the Main Sewage Pump Gate Valve Actuators"), dated June 4, 1996. *See Pudar Aff.* at ¶ 25. However, it fails to even argue that it gave notice of these claims.

at 5; *Def.'s Mem.* at 5. The City contested Perini's claimed entitlement to compensation for its indirect costs under the Changes Clause beyond the "accurate, complete and current" costs approved by both parties. *See Def.'s Reply Mem.* At 6; *Pl.'s Reply Mem.* at 3. Perini brought this action on June 24, 1997.

III. Jurisdiction

[1] Jurisdiction over this matter is predicated on 28 U.S.C. § 1332, as stated in the Complaint, not on 28 U.S.C. § 1331 as Perini incorrectly argues. *See Pl.'s Supp.Mem. of Law* at pp. 2-3. Federal question jurisdiction exists only where (1) a federal law creates the cause of action, or (2) a state cause of action presents a substantial federal question. *See West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir.1987). The incorporation of the EPA procurement regulations at issue here into a municipal construction contract does not give rise to federal question jurisdiction. *See J.A. Jones Construction Co. v. City of New York,* 753 F.Supp. 497, 499 (S.D.N.Y.1990) (incorporation of EPA procurement regulations "that define how to calculate additional payments for change orders and delays" into contract does not create federal question jurisdiction); *see also Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89 (5th Cir.1986) ("[W]e are aware of no case in which any court. . .has held that a private contract can give rise to federal question jurisdiction simply by 'incorporating' some federal regulatory standard

that would not have been binding on the parties by its own force."). No private cause of action exists under 40 C.F.R. Part 33. *See J. A. Jones*, 753 F.Supp. at 502. Moreover, there is no substantial federal interest in this otherwise local dispute merely because one of the parties is a recipient of an EPA grant: The policy underlying these regulations indicates "an intention to delegate procurement responsibility and management to the local level to the maximum extent possible." *Id.* at 505.

IV. Discussion

Perini provides three reasons why it is entitled to an equitable adjustment of $16,000,000 for increased costs caused by Change Orders issued by the City. It contends that the Changes Clause supersedes purportedly conflicting standard provisions in Contract 20G; it further contends that it complied with the notice provisions of the Changes Clause as liberally construed by federal law; finally, it argues that an equitable adjustment is warranted under federal law due to defective specifications in Contract 20G and a misrepresentation made by the City.

In turn, the City argues that Perini is not entitled to summary judgment on its claim for an equitable adjustment. In fact, according to the City, it is entitled to summary judgment on that claim, because Article 26 of Contract 20G bars recovery beyond the lump sum already negotiated. It contends that Article 26 is consistent with the Changes Clause and provides for modes of payment authorized by

parallel federal regulations. Further, the City claims that state law requires strict compliance with the notice provisions of Contract 20G, and that Perini has not provided the notice and documentation of claims required by Articles 27 and 54 of Contract 20G or the Changes Clause.[5]

A. Applicable Law

Perini and the City dispute whether federal or state law applies in construing the Changes Clause. The application of federal or state law significantly affects the parties' obligations under Contract 20G.

[2] Federal law, as developed by the Board of Contract Appeals and the Court of Claims, construes the notice provisions of the Changes Clause liberally; thus, a contractee's actual or constructive notice of the conditions underlying the claim excuses formal compliance when federal law is applied. *See Hoel-Steffen Constr. Co. v. United States,* 197 Ct.Cl. 561, 456 F.2d 760, 768 (1972) ("[N]otice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally where the Government is quite aware of the operative facts."); *Copco Steel Co. v. United States,* 169 Ct.Cl. 601, 341 F.2d 590, 598 (1965) ("[L]ack of strict compliance with many

---

[5]The City argues, in the alternative, that Perini waived claims for further compensation by its certification on the City's forms that costs were complete and authorized. The City contends that state law applies to the waiver issue because of the choice of law clause contained in the contract.

kinds of contract requirements concerning writings and notifications have [sic] frequently been held to be of no consequence where the conduct of the parties have made it clear that formal adherence would serve no useful purpose."); *Appeal of Mil-Pak Co., Inc., ASBCA No. 19733* (March 31, 1976), 76-1 BCA ¶ 11,836, ¶ 11,836 ("Simply stated, we do not feel that a valid changes claim, filed before final payment, should be barred by a failure to give notice thereof in accordance with the appropriate provision when it is reasonably certain that the Government would not have acted differently if such notice had been given").

[3] New York, on the other hand, requires strict compliance with notice provisions in public contracts as a condition precedent to the pursuit of compensation claims. *See Westinghouse Electric Corp. v. New York City Transit Auth.*, 735 F.Supp. 1205, 1224 (S.D.N.Y.1990) (noncompliance with timely notice provision barred claims for additional compensation pursuant to "New York case law recogniz[ing] that prompt, written notice requirements in public works contracts serve salutary purposes"); *Huff Enterprises, Inc. v. Triborough Bridge and Tunnel Auth.*, 191 A.D.2d 314, 595 N.Y.S.2d 178, 181 (1st Dep't. 1993) ("[E]nabl[ing] plaintiff to succeed in attempting to circumvent having to give written notice would eviserate [sic] the viability of these clauses in public works projects."); *Naclerio Contracting Co. v. Envtl. Protection Admin.*, 113 A.D.2d 707, 493 N.Y.S.2d 159, 160-61 (1st Dept.1985) (failure to comply with reporting and notice

provisions of contract barred contractor's claims against the City for extra work performed).

[4][5] The interpretation of the Changes Clause is in fact governed by state law. Federal common law applies where there is (i) a "uniquely federal interest" and (ii) a "significant conflict" between an identifiable federal policy or interest and state law. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). Federal common law has been applied only in limited areas. *See, e.g., id.* at 512, 108 S.Ct. 2510 (federal law applied to determine liability of independent military contractor); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 644 (9th Cir.1961) (federal law applied to interpret the term "equitable adjustment" in contract "connected to national security"). The Changes Clause neither invokes a "uniquely federal interest," nor presents a "significant conflict" with state law. *See Linan-Faye Constr. Co. v. Housing Auth.*, 49 F.3d 915, 920-21 (3d Cir.1995) (no uniquely federal interest in the interpretation of federally mandated provision in public housing construction contract, and no significant conflict where New Jersey courts would look to federal common law for guidance anyway); *Brinderson Corp. v. Hampton Roads Sanitation Dist.*, 825 F.2d 41, 44-45 (4th Cir.1987) (federal law only applicable because absence of state cases on point indicated that Supreme Court of Virginia would look to federal precedent for guidance).

In *Linan-Faye*, the Third Circuit found that a New

Jersey District Court had wrongly applied federal common law to a federally mandated "termination for convenience" clause in a contract between a public contractor and the city housing authority. 49 F.3d at 921. The Third Circuit decided, however, that the New Jersey courts would look to federal common law for guidance "unless to do so would violate some enshrined principle of New Jersey law," due to the absence of New Jersey cases interpreting the effect of "termination for convenience" clauses. *Id.* at 921-22. In *Brinderson*, the Fourth Circuit applied federal common law to a "differing site condition" clause mandated in construction contracts funded by the EPA, because "the Supreme Court of Virginia would follow federal interpretive precedents" due to the lack of relevant Virginia cases. 825 F.2d at 44. The court then construed the clause's notice provisions liberally in accord with precedent developed by the Court of Claims and the Board of Contract Appeals. *Id.* at 43-44. While both courts applied federal common law, they did so only because they determined that this is what state courts would do in the absence of relevant state court precedent. Thus, both stand for the proposition that state law, not federal common law, applies to the construction of federally-imposed contract clauses. *See Brinderson*, 825 F.2d at 44 ("We are not persuaded by the Clearfield Trust Co.[6] contention"); *Linan-Faye*, 49 F.3d at

---

[6]*Clearfield Trust Co. v. United States*, 318 U.S. 363, 744, 63 S.Ct. 573, 87 L.Ed. 838 (1943), held that federal law applied to matters affecting the operation of the federal government where a

920 (the district court "erred" in applying federal law).

The EPA procurement regulations at issue contravene any assertion that either a "uniquely federal interest" or "significant conflict" exists in their interpretation. The intent of Congress to not usurp the authority of the states is made clear in the initial section of 40 C.F.R. Part 33: "In the construction of treatment works program[s] under the Clean Water Act. . . .it is EPA's policy to delegate determinations on individual projects to State agencies to the maximum extent possible." 40 C.F.R. § 33.001(g). The regulations are "designed primarily to protect the public treasury from excessive expenditures, rather than to protect private contractors whose agreements contain provisions not as generous as those available in the regulations." *J.A. Jones*, 753 F.Supp. at 502; *see also Evansville Cement Finishers, Inc. v. Village of New Haven, Ill.*, 766 F.Supp. 692, 695 (S.D.Ill. 1991); *Roger J. Au & Son, Inc. v. Northeast Ohio Reg'l Sewer Dist.*, 29 Ohio App.3d 284, 293, 504 N.E.2d 1209 (1986) (The "policy underlying [the notice requirement of federally mandated 'differing site conditions' clause is]. . .to make the owner aware that monetary claims for extras may be forthcoming, and to give it an opportunity to investigate the conditions and minimize costs in dealing with them."). Furthermore, a breach of contract action is "traditionally relegated to state law." *J.A. Jones,* 753 F.Supp. at 502; *see also Boyle*, 487

---

uniform rule throughout the country was necessary.

U.S. at 507, 108 S.Ct. 2510 ("[A] conflict with federal policy need not be as sharp [where a uniquely federal interest is present] as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally occupied' ") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

Unlike the situations in both *Brinderson* and *Linan-Faye*, there is no indication here that state courts would look to federal interpretation of the Changes Clause for guidance. An "enshrined principle" of New York law requires strict compliance with notice provisions in general, as recently reaffirmed by the New York Court of Appeals. *See A.H.A. General Constr. v. New York City Housing Auth.*, 92 N.Y.2d 20, 33, 677 N.Y.S.2d 9, 16, 699 N.E.2d 368, 375, No. 90, 1998 WL 305439, at *7 (1998). In *A. H. A.*, the court granted the City Housing Authority's motion for summary judgment, finding that the contractor's noncompliance with notice and documentation provisions barred damage claims for extra work. *Id.* The court further stated that notice and documentation provisions serve an important public interest in that they "provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds." *Id.* While notice provisions similar to Articles 27 and 54 of Contract

20G, rather than the Changes Clause, were specifically before the Court of Appeals in *A.H.A.*, the court's emphasis on strict compliance is directed generally at "notice and reporting requirements in public contracts." *Id.*

Perini relies on a state trial court's determination that federal law applies to the interpretation of the notice provisions of the Changes Clause. *See Schiavone Constr. Co. v. City of New York*, Index No. 5060/92 (Sup.Ct.N.Y.Co. March 8, 1996). In *Schiavone*, a contractor claimed entitlement to an equitable adjustment for damages caused by changes ordered by the City after it submitted "letters regarding the proposed changes in the work and the date of the change orders. . . .In each of those cases,. . .[the letter describ[ed] a claim for direct costs associated with changes in the work. . .and specifically reserve[d] plaintiff's claim for an equitable adjustment." *Id.* at 11j, 11m. After determining that the Changes Clause superseded standard provisions of the contract, the trial court erroneously relied on *Bennett v. Kentucky Dep't. of Ed.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985), and *Au & Son supra*, for the proposition that "federal notice requirements apply on a federally funded project" and found that the City's actual knowledge of the claims excused any untimely submission of the letters. Index No. 5060/92 at 11n.

The reasoning of *Schiavone* is unpersuasive. First *Bennett* is clearly distinguishable. The *Bennett* Court held that "federal grant programs originate in and remained

governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." 470 U.S. at 669, 105 S.Ct. 1544. However the construction of notice requirements in a federally mandated contract clause presents an issue no addressed in *Bennett*, which dealt with a state's compliance with Title I regulations governing the use of federal education funds. *Id.* at 656, 105 S.Ct 1544. Furthermore, Congress has expressed its intent not to usurp the authority of the state by the issuance of the EPA regulations here at issue. *See* 40 C.F.R. § 33.001(g); *J.A. Jones*, 753 F.Supp. at 505. Therefore, the application of state law to the Change Clause not only does not conflict with *Bennett*, it also furthers Congressional policy underlying the EPA regulations.[7]

The *Schiavone* court attempts to distinguish *Linan-Faye* by noting that § 33.1030(1) ("Supersession Clause") "provide[s] that the federal regulation would supersede any contrary provision of the contract." Index No. 5060/92 at

---

[7]Reliance on *Au* further undermines the argument that federal law applies to the Changes Clause. The *Au* court applied both federal and state law to determine that constructive notice satisfies the notice requirements of a federally mandated "differing site conditions" clause. 29 Ohio App.3d at 291-92, 504 N.E.2d 1209. The same court's application of state law to a federally mandated "final payment clause", *see Mon-Rite Constr. Co. v. Northeast Regional Sewer Dist.*, 20 Ohio App.3d 255, 258-59, 485 N.E.2d 799 (1984), further indicates an intent to look to the relevant state law precedents for guidance, rather than support for the proposition that federal law applies to the Changes Clause.

11n. The Supersession Clause underscores the relevance of the Changes Clause. It does not, however, resolve the choice of law question: The mere fact that the Changes Clause applies does not determine how it is to be interpreted. Indeed, the Third Circuit applied state law to construe a federally mandated clause without considering the presence or absence of a supersession clause.

In sum, New York state law governs the interpretation of the notice and documentation requirements of the Changes Clause incorporated into Contract 20G. Federal common law does not apply due to (1) the lack of a uniquely federal interest and significant conflict between an identifiable federal policy and state law, and (2) the existence of state law requiring strict compliance with notice provisions in public contracts.

B. Notice Provisions

Strict compliance with the notice and documentation provisions of the Changes Clause requires the contractor to set forth the "general nature and monetary extent" of its claim for an equitable adjustment of the contract within 30 days after receipt of a written change order," 40 C. F. R. § 33.1030(3)(d). Unable to rely on a liberal interpretation of the notice provisions, Perini fails to demonstrate any genuine dispute as to its compliance either with the notice or the documentation requirements of the Changes Clause.[8]

---

[8]Perini's failure to comply with the more lenient notice and documentation requirements of the Changes Clause obviates any

Perini did not notify the City of its claim for indirect costs within 30 days after receipt of each change order or submit documentation of increased costs incurred as a result of each change order.

[6][7] First, Perini failed to comply with the notice provisions for change orders modifying work on the Valves. Change Orders 20G-33 and 20G-42 were issued in 1995 and 1996, but Perini refers only to letters submitted to the City in 1994. Letters submitted prior to the issuance of change orders cannot notify the City of damages incurred as a result of those orders. Perini's July 11, 1994 letter does not meet the notice requirement for the City's modification issued by letter on June 28, 1994. Not only does it not mention costs incurred as a result of the June 28 letter, it also specifically states that costs will be addressed in the future. *See Marash. Aff., Ex. 5* at unnumbered p. 4. No other letters within the 30-day deadline have been brought to the attention of the Court.

Second, non-compliance with the notice provisions for change orders regarding the motors defeats Perini's claims relating to Change Orders 20G-58, 20G-60, and 20G-68. Six letters dated in 1996 cannot satisfy the notice requirements for claims arising from either 20G-58 or 20G-60, issued on January 16, 1997, or 20G-68, issued on April 15, 1997. Letters dated March 4 and March 17, 1997, fall

---

need to consider the existence of a conflict between the Changes Clause and the stricter notice and documentation provisions of Article 27.

outside the 30-day deadline for 20G-58 and 20G-60, and precede the issuance of 20G-68. A letter dated January 28, 1997, only notifies the City of a vendor's refusal to warranty its work, not of increased costs resulting from a Change Order. *See Marash. Aff., Ex. 7* at unnumbered pp. 16-17.

Third, Perini's letters requesting an equitable adjustment of $11.6 million and compensation of $3,771,615, as well as its Notice of Claim, fail either to document the extent of the claim resulting from each Change Order issued subsequent to the completion date of Contract 20G or to comply with notice deadlines of the Changes Clause for most of the Change Orders. The October 4, 1996 letter does fall within the 30-day deadline for Change Orders 20G-53, 20G-54,[9] and 20G-57, but fails to even mention the work addressed by these Change Orders-fence work, installation of a protective canopy, and the installation of a boat pump discharge line. *See Marash. Aff., Ex. 9* at unnumbered pp. 1-8. Similarly, the March 4, 1997 letter does not address the installation of piping or work on ports ordered by the two change orders that fall within 30 days prior to its submission, 20G-64 and 20G-65. *Id* at unnumbered pp. 9-10.

The notification requirements are specifically intended to prevent a contractor from asserting claims for

---

[9]Change Order 20G-54 actually subtracts from, rather than adds to, Perini's work under Contract 20G.

"undocumented damages" that significantly exceed the contract price. *See A.H.A. General Constr.*, 677 N.Y.S.2d 9, at 17, 699 N.E.2d 368, at 375, 1998 WL 305439, at *7 (contractor's "accumulation of $1,000,000 in undocumented damages--a full 20% over the combined contract price--is precisely the situation that the cited [notice] provisions are intended to prevent"). Perini's claim for an equitable adjustment of $16 million to Contract 20G is approximately 40% of the contract price. Noncompliance with the notice and documentation provisions impedes City action to adjust changes ordered to the contract or to contain expenses.

Perini's failure to notify the City of its indirect costs caused by the issuance of the change orders eviscerates its claim for an equitable adjustment tinder the Changes Clause.[10] Similarly, noncompliance with the notice provisions entitles the City to partial summary judgment on its crossmotion: The disposition of both motions hinges on the absence of notice and documentation of Perini's claim as required by the Changes Clause.

---

[10]Because there is no genuine dispute regarding Perini's failure to comply with the notice provisions of the Changes Clause, it cannot recover under that clause based on allegations that the City's specifications were defective and/or that the City made misrepresentations. As I have discussed, recovery on Perini's third cause of action, which alleges solely that an equitable adjustment is warranted under the Changes Clause, requires compliance with the notice provisions of that clause.

V. Conclusion

While Perini half-heartedly argues that it submitted timely written notice of the general extent and monetary nature of its claims, its third cause of action ultimately rests on a liberal construction of the Changes Clause. The governing New York state law requires strict compliance with notice provisions in public contracts. Perini has not complied with either the notice or documentation required to support its claim for an equitable adjustment. Because Perini has therefore failed to "set forth specific facts showing that there is a genuine issue for trial," *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505, the City is entitled to partial summary judgment on its cross-motion. *See Westinghouse Electric*, 735 F.Supp. at 28 (summary judgment properly granted where plaintiff failed to comply with notice requirement for additional compensation for disputed work); *Huff Enterprises*, 595 N.Y.S.2d at 180 (summary judgment granted where plaintiff failed to comply with written notice provision of contract); *North Star Contracting Corp. v. New York City Transit Auth.*, 188 A.D.2d 412, 592 N.Y.S.2d 244, 244 (1st Dept. 1992) (summary judgment granted for failure to comply with contract notice provisions); *A.I. Smith Elec. Contractors, Inc. v. City of New York*, 181 A.D.2d 542, 581 N.Y.S.2d 44, 44 (1st Dept. 1992) (summary judgment properly granted where plaintiff failed to comply with documentation and notice provisions of contract); *Naclerio Contracting*, 493 N.Y.S.2d at 160-61 (summary judgment granted where

contractor failed to comply with documentation provisions). For the same reasons, Perini's motion for partial summary judgment--which requests an equitable adjustment under the Changes Clause--is denied.

Perini has withdrawn its first and second causes of action with prejudice. *See Perini's Letter to the Court, dated August 5, 1998.* Perini also has withdrawn its fourth cause of action--which claims breach of Contract through misrepresentation--subject to appeal of this Order, in 'accord with its view that this Court's decision on its third cause of action effectively grants summary judgment in favor of the City on the fourth cause of action as well. *See id.*

Because all of Perini's claims are either withdrawn or dismissed, this Order determines all issues before the Court and the Clerk is directed to close this case.

SO ORDERED.

APPENDIX C

UNITED STATES CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

Title 40--Protection of Environment;
Revised as of July 1, 1987
CHAPTER 1--
ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER 13--GRANTS AND
OTHER FEDERAL ASSISTANCE
PART 33--PROCUREMENT UNDER
ASSISTANCE AGREEMENTS
Subpart F-Subagreement Provisions

§ 33.1030 Model subagreement clauses.
40 CFR 33.1030

Recipients must include, when appropriate, the following clauses or their equivalent in each subagreement. Recipients may substitute other terms for "recipient and" "contractor" in their subagreements.

1. SUPERSESSION

The recipient and the contractor agree that this and other appropriate clauses in 40 CFR 33.1030 apply to that work eligible for EPA assistance to be performed under this subagreement and that these clauses supersede any conflicting provisions of this subagreement.

**** *paragraph 2 omitted****

3. CHANGES

(a) The following clause applies only to subagreements for construction. (1) The recipient may at any time, without notice to any surety, by written order designated or indicated to be a change order, make any change in the work within the general scope of the subagreement, including but not limited to changes:

(i) In the specifications (including drawings and designs);

(ii) In the time, method or manner of performance of the work;

(iii) In the recipient-fumished facilities, equipment, materials, services or site, or

(iv) Directing acceleration in the performance of the work.

(2) A change order shall also be any other written order (including direction, instruction, interpretation or determination) from the recipient which causes any change, provided the contractor gives the recipient written notice stating the date, circumstances and source of the order and that the contractor regards the order as a change order.

(3) Except as provided in this clause, no order, statement or conduct of the recipient shall be treated as a change under this clause or entitle the contractor to an equitable adjustment.

(4) If any change under this clause causes an increase or decrease in the contractor's cost or the time required to perform any part of the work under this contract,

whether or not changed by any order, the recipient shall make an equitable adjustment and modify the subagreement in writing. Except for claims based on defective specifications, no claim for any change under paragraph (a)(2) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as required in paragraph (a)(2). In the case of defective specifications for which the recipient is responsible, the equitable adjustment shall include any increased cost the contractor reasonably incurred in attempting to comply with those defective specifications.

(5) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under paragraph (a) (1) or the furnishing of a written notice under paragraph (a) (2), submit a written statement to the recipient setting forth the general nature and monetary extent of such claim. The recipient may extend the 30-day period. The contractor may include the statement of claim in the notice under paragraph (2) of this change clause.

(6) No claim by the contractor for an equitable adjustment shall be allowed if made after final payment under this subagreement.

United States Constitution
Article VI
paragraph 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

33 USC § 1251(a)

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants

into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 USC § 1281(a)

(a) Development and implementation of waste treatment management plans and practices

It is the purpose of this subchapter to require and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this chapter.

33 USC § 1361(a)

(a) Authority of Administrator to prescribe regulations

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

(3)

No. 99-615

FILED
NOV 10 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PERINI CORPORATION,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL D. HESS,
Corporation Counsel for the
City of New York,
Attorney for Respondent,
100 Church Street,
New York, N.Y. 10007
(212) 788-1233

LEONARD J. KOERNER,*
FRANCIS F. CAPUTO
DONA B. MORRIS
LEWIS S. FINKELMAN
JOHN de P. DOUW
of Counsel.

* Attorney of Record

November 9, 1999.

32 pp

QUESTION PRESENTED

Whether the notice provision of the Changes Clause, a federal regulation incorporated into the construction contract between a contractor and the City of New York for the performance of work on a municipal water treatment facility, a project partially funded by federal grant monies, should be strictly construed in accordance with New York law, where the parties agreed to be bound by New York law and resolution of the choice of law issue does not implicate any uniquely federal interest nor does it entail any significant conflict between an identifiable federal policy and the operation of state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF FACTS 2

ARGUMENT

THE DETERMINATION THAT THE NOTICE PROVISION OF THE CHANGES CLAUSE MUST BE STRICTLY ENFORCED AS PROVIDED BY THE CONTRACT AND IN ACCORDANCE WITH NEW YORK LAW FULLY COMPORTS WITH DECISIONS OF THIS COURT 9

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page**

A.H.A. General Construction, Inc. v. New York City Housing Auth., 92 N.Y.2d 20 (1998) 18, 21, 22

Aircraft Gear Corp. v. Kaman Aerospace Corp., 875 F. Supp. 485 (N.D.Ill. 1995) 19

Atherton v. F.D.I.C., 519 U.S. 213 (1997) 11

Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) 24

Boyle v. United Technologies Inc,, 487 U.S. 500 (1988) . . . . . 11, 12, and passim.

Brinderson Corp. v. Hampton Roads Sanitation District, 825 F.2d 41 (4th Cir. 1987) 8, 14

City of New York v. Job-Lot Pushcart, 88 N.Y.2d 163 (1996) 24

Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943) 15

Copco Steel Co. v. U.S., 341 F.2d 590 (Ct. Cl. 1965) 19

Cases **Page**

Virgin Islands Housing Authority v. Coastal General Construction Services Corp., 27 F.3d 911 (3d Cir. 1994) 14,17

W.W.W. Giancontieri, 77 N.Y.2d 157 (1990) 23

Westinghouse Electric Corp. v. New York City Transit Authority, 735 F. Supp. 1205 (S.D.N.Y. 1990) 18

Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir 1986) 10

Woodward Governor Co. v. Curtiss-Wright Flight Systems, 164 F.3d 123 (2d Cir. 1999) 12

Statutes and Regulatons

Clean Water Act, 33 U.S.C. § 1251 et seq., ... 2,3

28 U.S.C. § 1331. 15

28 U.S.C. § 2201 15

40 C.F.R. 33.001(g)(rev. July 1, 1993) 3

40 C.F.R. § 33.210(a)(rev. July 1, 1993) 3

Cases **Page**

Marine Midland Bank v. United Missouri Bank,
223 A.D.2d 119 (1st Dep't 1996) . . . . . 10n.

Mastrobuono v. Shearson Lehman Hutton,
514 U.S. 52 (1995) 23

Miree v. DeKalb County,
433 U.S. 25 (1977) 11

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 16

Reliance Insurance Co. v. U.S.,
20 Cl. Ct. 715 (Cl. Ct. 1990),
aff'd, 931 F.2d 863 (Fed. Cir. 1991) 21

Sanders v. Winship,
57 N.Y.2d 391 (1982) 16

Sante Fe Engineers v. U.S.,
801 F.2d 379 (Fed. Cir. 1986) 21

Sunrise Mall Association v. Import Ally,
211 A.D.2d 711 (2d Dep't 1995) 23

Turtur v. Rothschild Registry International, Inc.,
26 F.3d 304 (2d Cir. 1994) 10

United Contractors v. U.S.,
368 F.2d 585 (Ct. Cl. 1966) 20

Cases **Page**

Virgin Islands Housing Authority v. Coastal General Construction Services Corp., 27 F.3d 911 (3d Cir. 1994) 14,17

W.W.W. Giancontieri, 77 N.Y.2d 157 (1990) 23

Westinghouse Electric Corp. v. New York City Transit Authority, 735 F. Supp. 1205 (S.D.N.Y. 1990) 18

Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir 1986) 10

Woodward Governor Co. v. Curtiss-Wright Flight Systems, 164 F.3d 123 (2d Cir. 1999) 12

Statutes and Regulatons

Clean Water Act, 33 U.S.C. § 1251 et seq., ... 2,3

28 U.S.C. § 1331. 15

28 U.S.C. § 2201 15

40 C.F.R. 33.001(g)(rev. July 1, 1993) 3

40 C.F.R. § 33.210(a)(rev. July 1, 1993) 3

Statutes

40 C.F.R. Part 35 Appendix C-2 to Subpart E (1993) 5

53 F.R. 8073 17

No. 99-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PERINI CORPORATION,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. Appendix A) is not reported in an official reporter. The Court of Appeals' summary order affirming the decision of the District Court for the Southern District

of New York is reported at 182 F.3d 901 (2d Cir. 1999). The opinion of the District Court (Pet. Appendix B) is reported at 18 F.Supp.2d 287 (S.D.N.Y. 1998).

STATEMENT OF FACTS

Congress declared that the objective of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, was to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress made manifestly clear its intention not to have federal law pre-empt the field of construction project management of water pollution control projects. Thus, in 33 U.S.C. § 1251 (b), Congress declared as a goal and policy:

> Congressional recognition, preservation, and protection of primary responsibilities and rights of States. . . . It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, ... It is the policy of Congress that the States manage the construction grant program under this Act . . . .

In parallel fashion the federal regulations applicable to such construction projects provided

> In the construction of treatment works program[sic] under the Clean Water Act (33 U.S.C. 1251 *et seq.*), it is E.P.A.'s[1] policy to delegate

---

[1] The federal Environmental Protection Agency.

> determinations on individual projects to State agencies to the maximum extent possible . . . .

40 C.F.R. 33.001(g)(rev. July 1, 1993).

In the section of the E.P.A. regulations entitled "Recipient Responsibility," responsibility is delegated to the grant recipient for management of the project as follows:

> (a) the recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgment and good administrative practice of all contractual and administrative issues arising out of subagreements entered into under the assistance program. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of subagreements, settlement of protests, claims, disputes and other related procurement matters.

40 CFR § 33.210(a)(rev. July 1, 1993).

Within the context of this statutory and regulatory framework, in December of 1993, Perini and the City of New York (the "City") entered into a construction contract (the "contract") for the replacement and improvement of certain facilities at the Coney Island Water Pollution Plant (the "project"). Under the Clean Water Act, the E.P.A. funded 55% of the contract, the price of which was some $40,000,000. The City provided the remaining funding.

Both the original grant agreement between the City and EPA and a subsequent amendment thereto increasing funding for the project mandated inclusion in the contract of

certain provisions set forth in the Code of Federal Regulations. Of particular concern here are the "Supersession Clause" and the "Changes Clause" to which it refers:

> The Supersession Clause
>
> 1. General
> (a) the owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.
>
> The Changes Clause
>
> 2. Changes
> (a) The owner may, at any time . . . by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract . . . .
>
> (b) Any other written order or an oral order. . . from the owner, which causes any such change, shall be treated as a change order under this clause, if the contractor gives the owner written notice stating the date, circumstances, and source of the order and if the contractor regards the order as a change order.
>
> * * *
>
> (d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part

of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. However, except for claims based on defective specifications, no claim for any change under paragraph (b) of this section 2., shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as there required. Also, in the case of defective specifications for which the owner is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under paragraph (b) of this section 2., submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period. The statement of claim hereunder may be included in the notice under paragraph (b) of this section 2.

40 C.F.R. Part 35 Appendix C-2 to Subpart E (1993).

In addition to the federally mandated clauses, the contract includes standard provisions providing for the making of changes to the contract and the issuance of change orders, Article 25; prescribing the methods of payment for contract changes: either by applicable contract unit prices, reasonable costs plus an allowance for overhead

and profit, or a negotiated payment, Article 26; and defining notice and documentation requirements respecting claims, Article 27

Also, Article 54 of the contract in pertinent part provides:

> No claims against the City for damages for breach of Contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims as have been herein provided.

Finally, the contract contained a choice-of-law provision, Article 62, in which the parties agreed that the contract was to be governed by and construed in accordance with the laws of the State of New York.

During the course of work on the project, Perini and the City negotiated lump sum payments which, as the contractor certified, covered the "accurate, complete, and current" costs of the change orders involved in this litigation. Perini, however, claimed entitlement to compensation under the Changes Clause for alleged indirect costs beyond those agreed to by both parties and, upon the City's refusal to pay, brought this lawsuit.[2]

---

[2] The kind of damages for which Perini is suing, increased costs attributable to changed contract conditions but not part of the changed work, are variously referred to as delay damages, impact costs or ripple costs.

Perini sought summary judgment establishing the City's liability on Perini's third cause of action, which sought an "equitable adjustment" of $16 million for the claimed indirect costs. The City cross-moved for summary judgment, arguing, *inter alia,* that the contractor's failure to comply with the notice provisions of the Changes Clause barred its claims. In opposing the City's cross-motion, Perini argued that its claims were viable because federal law governed interpretation of the Changes and Supersession Clauses and that federal courts and agencies would construe the notice requirements of the Changes Clause liberally.

The District Court found that 1) New York law governed interpretation of the notice provision of the Changes Clause; 2) New York courts construe such notice requirements strictly; and 3) Perini's evidence of notice did not demonstrate compliance with the notice requirements of the Changes Clause.[3]

The Court of Appeals affirmed. In its unreported summary order,[4] the Second Circuit agreed that New York

---

[3] The District Court noted that Perini's failure to comply with the more lenient notice and documentation requirements of the Changes Clause obviated any need to consider the existence of a conflict between the Changes Clause and the more demanding notice and documentation provisions of Article 27 of the contract. 18 F.Supp.2d at 295 n. 8.

[4] Since the Second Circuit's summary order specifically provides that it "will not be published in the federal reporter and may not be cited as precedential authority to (continued...)

law governed interpretation of the notice provision of the Changes Clause. In so holding, the Court of Appeals cited to Linan-Faye Constr. Co. v. Housing Auth. of Camden, 49 F.3d 915, 919-21 (3d Cir. 1995 (holding that state law governed construction of the federally mandated termination clause despite use of federal funds for the project and adoption of forms authorized by the federal agency) and Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41, 44-45 (4th Cir. 1987) (stating that the court was "not persuaded" by the contention that federal law controlled construction of a federally mandated clause in contract, but following federal law because state courts would follow do so in the absence of controlling state authority).

Furthermore, the Court of Appeals did not perceive any conflict between, on the one hand, the notice provision of the Changes Clause and, on the other hand, the contract clauses requiring strict construction of notice provisions and the application of New York law. The Court of Appeals, therefore, rejected Perini's argument that the Supersession Clause required nullification of the contractor's agreement that 1) it would comply strictly with the notice requirements of the Changes Clause; and 2) New York law would govern interpretation of the contract.

Finally, the Court of Appeals examined each of the documents that the contractor claimed constituted the notice required by the Changes Clause, finding that most were

---

[4] (...continued)
this or any other court," it is difficult to comprehend petitioner's description of this decision as "the lead case of decision on this issue in the United States." Pet. 7.

untimely and that those that arguably were timely failed adequately to inform the City of the monetary extent of the damages claimed as the result of a particular change order, as the Changes Clause required.

ARGUMENT

THE DETERMINATION THAT THE NOTICE PROVISION OF THE CHANGES CLAUSE MUST BE STRICTLY ENFORCED AS PROVIDED BY THE CONTRACT AND IN ACCORDANCE WITH NEW YORK LAW FULLY COMPORTS WITH DECISIONS OF THIS COURT.

(1)

The decision of the Court of Appeals, affirming the decision of the District Court and holding that New York law governs the interpretation of the notice provision of the Changes Clause, is correct and does not conflict with any decision of this Court or any other court of appeals. Also correct is the finding of the Court of Appeals that there is no conflict between the Changes Clause's notice requirements and those clauses of the parties' contract requiring strict compliance with such requirements and construction of the contract under New York law. Accordingly, contrary to the contractor's arguments, the Supersession Clause of the contract does not require nullification of Perini's contractual agreements that it would strictly comply with the notice requirements of the Changes Clause as a precondition to assertion of a claim for payment under that provision and that New York law would govern interpretation of the contract.

Perini, in executing the contract, agreed to be bound by its choice of law provision, which required that it be construed in accordance with New York state law. Both federal and New York state courts recognize that where parties to a contract include a choice-of-law clause providing for construction of the agreement in accordance with New York state law, that clause generally must be honored, where, as here, New York has a reasonable relationship to the agreement. See for example Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 310 (2d Cir. 1994); Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1986); Freedman v. Chemical Construction Corp., 43 N.Y.2d 260, 264 (1977).

Nonetheless, Perini, realizing that its claim for an equitable adjustment is barred when the notice provision of the Changes Clause is strictly construed as the contract and New York law require, seeks to nullify its agreement to be bound by the interpretation of the contract under New York law. Under New York law, as under federal law, however, the presumption remains that the contract will be interpreted according to New York law. [5] See Erie Railroad Co. v.

---

[5] In Marine Midland Bank v. United Missouri Bank, 223 A.D.2d 119, 123 (1st Dep't 1996), for example, the New York Supreme Court, Appellate Division, First Department recently noted that a contract's choice of law provision might be held invalid only where the issue is of such overriding concern to the public policy of the other jurisdiction as to override the intent of the parties and the interest of the State of New York in enforcing its own

(continued...)

Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

While, in the years since Erie, this Court has at times found federal law displaces state law, the exceptions have been few and the tests rigorous. As this Court explained in Boyle v. United Technologies, Inc., 487 U.S. 500 (1988), in most fields of activity, this Court "has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription . . . or a direct conflict between federal and state law." 487 U.S. at 504 (citations omitted). Having cautioned against the broad use of federal common law in, for example, Miree v. DeKalb County, 433 U.S. 25, 31-32 (1977) (federal common law found not to govern air crash survivors' suit against the county as third-party beneficiaries of a contract between the county and the federal government), this Court, in Boyle, stated the test applicable to the choice of law question raised in this case. The Boyle Court found that federal common law only applies where there is 1) a "uniquely federal interest" and 2) a "significant conflict" between an identifiable federal policy or interest and the operation of state law. Boyle, 487 U.S. at 507. Compare Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997) (normally when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law must first be specifically shown).

---

[5] (...continued)
policies.

As summarized recently by the Second Circuit, under the rule stated in Boyle, federal common law applies only in those limited situations where a uniform national rule is necessary to further the interests of the federal government. Marcus v. A.T.&T., 138 F.3d 46 (2d Cir. 1998). In Boyle this Court found uniquely federal interests to arise only in a few areas, such as: the obligations to, and rights of, the United States under its contracts; the liability of federal officers for official acts; and civil liabilities arising out of federal procurement contracts. 487 U.S. at 504-506. See also Woodward Governor Co. v. Curtiss-Wright Flight Systems, 164 F.3d 123, 127 (2d Cir. 1999). Thus, in Boyle, federal law was applied to determine the tort liability of an independent contractor which, under the federal procurement program, had provided helicopters to the U.S. Marines.[6] The narrow reach of the requirement

---

[6] Perini makes the breathtaking leap from this Court's finding in Boyle that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced," 487 U.S. at 512, to the totally unsupported observation that the Boyle Court "concluded that state laws that hold the contractor liable for Unforeseen Conditions, by exculpatory or other clauses present a 'significant conflict' with federal policy and must be displaced." Pet. 21. According to Perini, therefore, the Second Circuit's decision is in conflict with Boyle.

This is just one of the most salient misstatements contained in Perini's petition, many of which grow out of Perini's attempt to obscure the fundamental point that the contract at issue here is not a federal procurement contract.

(continued...)

for a uniform federal rule may be seen, for example, by the result in Marcus, supra, 138 F.3d at 54, where the Second Circuit applied the Boyle test to find no uniquely federal interest in preventing a carrier from misrepresenting the nature of its rates to customers, although the Federal Communications Act evidenced a federal interest in uniformity of charges in telecommunications.

(3)

The notice requirements of the Changes Clause found in the contract simply does not invoke a "uniquely

---

[6] (...continued)
Thus, in its discussion of Boyle, Perini attempts to disregard the fact that, unlike the defendant in Boyle, who was a Government contractor which, under its contract, provided equipment to the federal government as part of the federal procurement program, Perini contracted with the City under the City's procurement program which, in part, benefitted from federal funding. Similarly, Perini repeatedly conflates federal and municipal procurement programs, for example, referring to United States. Government's "uniquely federal interest in its national procurement program." Pet. "i" and passim.

Perini's discussion of the split in authority as to whether the government contractor defense is available only to manufacturers of military products or extends also to Government contractors providing nonmilitary products to the federal government under the federal procurement program, Pet. 22-23, obviously, is totally irrelevant to this case, which does not involve either an assertion of the government contractor defense or federal procurement.

federal interest," and thus, under Boyle, federal common law does not apply to its interpretation.

"[T]he fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant that all aspects of its performance or nonperformance are to be governed by federal law rather than state law applicable to similar contracts in businesses not under federal regulation.'" Linan-Faye Construction Co., Inc., v. Housing Authority of City of Camden, 49 F.3d 915, 919 (3d Cir. 1995), quoting Virgin Islands Housing Authority v. Coastal General Construction Services Corp., 27 F.3d 911, 916 (3rd Cir. 1994). In Linan-Faye, supra, the parties entered into a contract which was funded in substantial part by a grant from the United States Department of Housing and Urban Development. 49 F.2d at 917. As here, the applicable federal regulations mandated the inclusion of certain provisions in the contract, including a termination for convenience clause. Id. at 921, 936. The Housing Authority terminated the contract, and the contractor commenced a federal action seeking specific performance and damages. The District Court, exercising diversity jurisdiction over the matter, applied federal, not New Jersey, common law in interpreting the federally-required termination for convenience clause. Id. at 919. However, the Court of Appeals for the Third Circuit applied the test articulated in Boyle and reversed with the direction that the District Court resolve all remaining issues in accordance with New Jersey law, holding that "it is the law of New Jersey that governs the interpretation of this contract." Id. at 921.

Brinderson Corporation v. Hampton Roads Sanitation District, 825 F.2d 41 (4th Cir. 1987), is a case

decided before the Supreme Court had articulated the clear test of Boyle. In Brinderson, the Fourth Circuit rejected the argument that federal law should control the construction of provisions drawn from federal regulations in a contract, partially funded by an E.P.A. grant, between a contractor and a regional subdivision of the Commonwealth of Virginia for the construction of a waste water treatment facility because such a result was required under Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943). Thus, the Brinderson Court did not find that the facts of the case mandated the use of federal common law in order to assure the application of a uniform rule. 825 F.2d at 44. The Fourth Circuit, however, did hold that federal common law was relevant, but not because federally mandated provisions in state or municipal contracts carry with them federal common law. Rather, the Brinderson Court looked first to state law and found that federal common law was, in the absence of applicable Virginia case law on the subject, what Virginia courts would have adopted. The absence of Virginia precedents on the disputed issue contrasts sharply with this case, where there is extensive New York case law addressing the interpretation of the contractual notice provisions and requiring the strict compliance with such requirements.

J.A. Jones Constr. Co. v. City of New York, 753 F. Supp. 497, 505 (S.D.N.Y. 1990), is also instructive. In J.A. Jones, the contractor argued that the incorporation of federal regulations defining how to calculate payments for change orders and delays in a contract with New York City funded by an E.P.A. grant provided a basis for federal question jurisdiction under 28 U.S.C. § 1331 as well as jurisdiction pursuant to the federal declaratory judgment statute, 28 U.S.C. § 2201. In J.A. Jones, the District

Court rejected the contractor's arguments, finding that the construction of federal regulations incorporated in a federally funded construction contract does not present a substantial issue of federal law. 753 F. Supp. at 504-505.

It is a well-settled principle of statutory construction that a statute or a set of regulations must be construed as a whole and that its various sections must be considered together and with reference to each other. See Marine Carriers Corp. v. Fowler, 429 F.2d 702, 706 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971), quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935)("'[T]he meaning of a statute is to be looked for, not in any single section, but in all parts together and in their relation to the end in view.'"); Sanders v. Winship, 57 N.Y.2d 391, 395-396 (1982) ("[A] statute is to be viewed as a whole. To this end, all parts thereof, if possible, are to be harmonized to achieve the legislative purpose.").

Thus, both the Supersession Clause and the Changes Clause must be understood in the context of the Clean Water Act's clear embodiment of a Congressional intent to delegate responsibility for construction projects to the recipients of federal grants as indicated in the provisions of the applicable statute and regulations quoted above at pages 2-3.

Furthermore, Perini has not identified, because it cannot, any statutory declaration that federal law must govern in the interpretation of contracts for municipal projects funded by the E.P.A. under the Clean Water Act. Perhaps the strongest support the contractor can muster for its argument that, in the interest of uniformity, federal common law should be applied to interpret the notice

provision of the Changes Clause because a uniform policy is required a directive issued by President Reagan in 1988. Pet. 6-7, 19. As part of the Presidential "regulatory relief program," which aimed to reduce the burden of federal regulation and paperwork, the directive called for the publication of common regulations, thus aiming for consistency and uniformity among all federal assistance awarding agencies. 53 F.R. 8073. However, Perini cites to no case law indicating that the Reagan house-cleaning directive calls for, in the name of national uniformity, the application of federal common law to all contracts entered into by any recipient of federal funding. Indeed, the Court of Appeals for the Third Circuit found that the interest in uniformity in construction of federal contractual provisions is not enough to pose federal question issues. Virgin Islands Housing Authority v. Coastal General Construction Services Corp. 27 F.3d 911, 916 (3d Cir. 1994).

Therefore, given the expressed Congressional intent to delegate responsibility for management of construction projects to the recipients of E.P.A. grants, the contract's Supersession Clause itself cannot and does not, as Perini argues, operate to nullify or pre-empt other standard City contract provisions included in the contract that touch matters covered by the Changes Clause. Nor does it speak to the choice of law issue, much less mandate the application of federal common law to disputes over contract administration between a recipient of an E.P.A. grant and its chosen contractors. The Supersession Clause merely provides that the Changes Clause, as a "supplemental general provision" included in the contract, supersedes any conflicting provisions.

In sum, there is no uniquely federal interest entailed by the interpretation of the notice provision of the Changes Clause in a contract to which the federal government is not a party under a statutory and regulatory scheme in which responsibility for the construction of local facilities is delegated to the grant recipient.

(4)

Under Boyle, the existence of a uniquely federal interest is a necessary but not sufficient condition for the displacement of state law. 487 U.S. at 507. While that necessary condition plainly has not been met in this case, assuming it to have been met for the sake of argument, the existence of a conflict between the operation of New York law and an identifiable federal policy is similarly absent.

The contract, in Article 54, specifically requires strict enforcement of notice provisions. Furthermore, New York law enforces provisions requiring strict compliance with notice requirements in public contracts as conditions precedent to claims for extra compensation. See for example, A.H.A. Gen. Constr., Inc. v. New York City Housing Auth., 92 N.Y.2d 20 (1998); Westinghouse Electric Corp. v. New York City Transit Auth., 735 F. Supp. 1205, 1224 (S.D.N.Y. 1990).

On the other hand, under federal common law, in cases where contracts have not specified strict construction of notice provisions, courts at times liberally construe contractual notice provisions, excusing strict, formal compliance with certain kinds of notice provisions when actual or constructive notice of the underlying facts on the part of the contractee is found. See for example, Hoel-

Steffen Constr.Co. v. U.S., 456 F.2d 760, 768 (Ct. Cl. 1972); Copco Steel Co. v. U.S., 341 F.2d 590, 598 (Ct. Cl. 1965). It is worth noting, however, that, even where federal common law has been applied, a contractual provision requiring strict compliance with notice requirements may be enforced. See Aircraft Gear Corp. v. Kaman Aerospace Corp., 875 F. Supp. 485, 492-495 (N.D.Ill. 1995).

In attempting to confect an argument that the strict interpretation of the notice provision of the Changes Clause required by New York law conflicts with some significant federal policy, Perini discerns a federal policy that the government, not the contractor, should absorb the increased costs of delays, which policy mandates equitable adjustments that make contractors whole. The rationale for this supposed policy is that, in anticipation of such equitable adjustments, public contractors will not provide in their bids for contingency costs to cover indirect costs of delays. Thus, according to Perini, the equitable adjustment language of the Changes Clause embodies a federal policy designed to induce contractors to submit lower bid prices for public contracts. Pet. 8-12.[7] Perini understands this policy to entail an interpretation of the notice provision of the Changes Clause so liberal that no notice would be required

---

[7] While Perini argues that its interpretation of the Changes Clause is necessary to prevent the submission by contractors of inflated bids, it should be noted that if the City finds bid prices to be inflated it can and does reject all bids and rebid the contract. Furthermore, if the E.P.A. finds bids inflated, it can refuse to fund the project.

as to "changes that the City itself had directed as the City had actual knowledge of such changes." Pet. 5.[8]

Perini relies primarily upon Foster Construction v. U.S., 435 F.2d 873 (Ct. Cl. 1970) in support of its argument that there is a federal policy that requires payment of all of a contractor's claimed indirect costs of delays relating to change orders. However, this Court should note that Foster deals only with the very narrow and specific issue of delays related to differing site conditions and involves consideration of issues not relevant here, such as the extent to which bidders should be able to rely upon the owner's representations concerning subsurface conditions as opposed to their own pre-bid investigations. 435 F.2d at 886-888. Kaiser Industries Corp. v. U.S., 340 F.2d 322 (Ct. Cl. 1965) and United Contractors v. U.S., 368 F.2d 585 (Ct. Cl. 1966), also cited by Perini, both similarly deal with changed subsurface conditions, which have a particular relation to bid prices. Pet. 8-10.

Indeed, contrary to Perini's argument, the Federal Circuit has held, on at least two occasions, that federal agencies in fact are free to place cost limitations on change orders issued pursuant to the Changes Clause. In Reliance

---

[8] Perini does not deal with the fact that the notice provision requires notice of both the general nature and the monetary extent of the claim being asserted. The owner's knowledge of the fact of a contract change does not automatically supply it with knowledge of costs incurred by the contractor indirectly resulting from such a change.

If, as Perini states, the district court observed that "if the liberal federal law applied, Perini would prevail," Pet. 4-5, that statement does not occur in its reported decision.

Insurance Co. v. U.S., 20 Cl.Ct. 715 (Cl. Ct. 1990), aff'd 931 F.2d 863 (Fed. Cir. 1991), and Sante Fe Engineers v. U.S., 801 F.2d 379 (Fed. Cir. 1986), the underlying contracts included another federal regulation which limited the amount recoverable by the contractor for both overhead and profit with respect to changes to no more than 10% of the contractor's direct costs. Notwithstanding the "equitable adjustment" language of the Changes Clause, the Court in both cases upheld the costs limitations contained in the other regulation. In fact, in Reliance, the Court affirmed dismissal of the contractor's claim seeking $1.3 million in delay damages and held that such limitations apply "regardless of the size and scope of contract changes." 931 F.2d at 865.

Perini contrasts this supposed federal policy of reimbursing contractors for all claimed costs of delays with what it asserts is the City's policy of exculpating itself from liability for all increased costs due to delays. (Pet. 8-12). Perini then leaps to the conclusion that these supposed policy differences directly result in an inconsistency between federal and New York law with respect to the interpretation of the notice provision of the Changes Clause such that, in order to effectuate the intent of the regulations, federal common law must be applied.

The main point that must be made in response to Perini's policy argument is that this case only concerns the interpretation of notice requirements and, as the New York Court of Appeals has recently stated, in A.H.A General Construction, Inc. v. New York City Housing Auth., 92 N.Y.2d 20 (1998), notice provisions in public contracts are not exculpatory clauses, nor do they embody any substantive rule of liability for construction costs. Rather,

notice provisions are conditions precedent to recovery which serve salutary purposes with respect to protection of the public treasury. 92 N.Y.2d at 30-34. Indeed, as the Court of Appeals observed in A.H.A., notice provisions are intended to prevent precisely the situation raised in this litigation, the accumulation by a contractor of undocumented damages amounting to a substantial percentage of the actual price of the contract. See Id. at 34.[9] Since protection of the public fisc is the essential policy that may be seen also to underlay the federal regulations incorporated into contracts funded in part by EPA grants, there is no fundamental inconsistency to be found respecting the interpretation of contractual notice provisions.

Given the nature and function of the notice provisions at issue here, Perini's depiction of the City's procurement policy, and its supposed conflicts with federal procurement policy is simply not relevant. Furthermore, given that the contract at issue here, like all standard City contracts, provides for the issuance of change orders to compensate the contractor for the extra costs entailed by the performance of extra work, Perini's statements that it is the City's policy "to exculpate itself from all increased costs," Pet. 10, is patently absurd.

Perini's argument that the notice requirements of the Changes Clause as interpreted under the generally more liberal approach to such provisions of federal common law should displace the contract's requirement of strict compliance with notice provisions is supported by neither

---

[9] In this case, Perini is claiming $16,000,000 in delay damages, approximately 40% over the contract price.

the holding of Boyle, the language of the Supersession Clause, nor by well-established principles of contract construction. There is, in sum, no significant conflict involved here.

Under both federal and New York common law it is a fundamental principle of contract construction that the contract should be read so as to give meaning to all of its provisions and to render them consistent with each other. Thus, a contract should be interpreted to give meaning to all of its parts. An interpretation that renders portions of the contract ineffective or meaningless should be avoided. See for example Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 at 63 (1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corp., 84 F.3d 91, 99 (2d Cir 1996); W.W.W. Giancontieri, 77 N.Y.2d 157 (1990); Sunrise Mall Association v. Import Ally, 211 A.D.2d 711 (2d Dep't 1995).

Contract Article 54 and the notice requirements of the Changes Clause, therefore, under fundamental principles of contract interpretation, should not be read to conflict. In fact, they can easily occupy the Contract together, without the Supersession Clause nullifying any part of them. The federal notice requirements provide that the contractor must "within 30 days after receipt of a written change order . . . submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period." This certainly does not conflict with Article 54, which merely requires strict compliance with the very notice obligations set forth in the Changes Clause.

While Perini argues that the Changes Clause's notice provision, liberally construed, should completely replace any other contractual notice provision, the language of the Supersession Clause does not mandate such a result. The Supersession Clause simply provides that the provisions of the Changes Clause supersede any "conflicting" provisions of the agreement. Were it intended that the provisions in the federal Changes Clause exclusively governed the contractor's obligation for notice, thus overriding the standard contract article requiring strict compliance with notice and reporting provisions, Article 54, the Supersession Clause would have said so.

This Court, in Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996), in reviewing the tests for pre-emption, observed that a federal law may be in "irreconcilable conflict" with state law when compliance with both statutes may be a "physical impossibility," or the state law may "stand as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." 517 U.S. at 31. Accord City of New York v. Job-Lot Pushcart, 88 N.Y.2d 163, 167 (1996).

Here, Perini does not contend, nor could it, that it was impossible to comply with both the notice requirement of the Changes Clause and Article 54's requirement of strict compliance with contractual notice provisions. Accordingly, the notice provision of the federal Changes Clause, does not, as Perini contends, supersede the contract's requirement, in Article 54, of strict compliance with contractual notice provisions as a precondition for the assertion of any claims.

In sum, there is no inconsistency between federal policy respecting the notice provision of the Changes Clause and the operation of New York law in interpreting that provision. Thus, Perini cannot escape strict compliance with the contract's notice provisions as required by the contract and its construction under New York law. Furthermore, the Court below followed precedent established by this Court and consistent with that of other circuits in so finding.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 9, 1999

Respectfully submitted,

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street, Room 6-183
New York, New York 10007
(212) 788-1233

By: Dona B Morris
DONA B. MORRIS
Assistant Corporation Counsel

(4)

Supreme Court, U.S.
FILED
NOV 15 1999
OFFICE OF THE CLERK

No. 99-615

IN THE

Supreme Court of the United States

PERINI CORPORATION,

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ELI S. COHN
Counsel of Record
K. RICHARD MARCUS
MCDONOUGH MARCUS COHN TRETTER
HELLER & KANCA, L.L.P.
Attorneys for Petitioner
3 Park Avenue
New York, New York 10016
(212) 779-9700

15 pp

RULE 29.6 STATEMENT

Petitioner, Perini Corporation, has no parent company and its shares are publicly traded on the American Stock Exchange. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

PAGE NO.

RULE 29.6 STATEMENT..... i

TABLE OF AUTHORITIES..... ii

ARGUMENT..... 1

(a) State Law is Not the Law of Decision to Interpret the Federal Regulation..... 1

(b) If State Law is the Law of Decision Herein, There are No New York Cases that Construe the Federal Regulation and New York Would Look to and Apply Federal Common Law..... 2

(c) The Contract Provisions Relied on by the Respondent are Pre-empted by the Regulation's Supersession Clause..... 4

(d) Delegation of Responsibility to Manage the Project Does Not Authorize the Respondent to Disregard the Changes and Supersession Clauses..... 8

(e) Federal Common Law is Applicable to Interpret a Contract Containing the Federal Regulation Entered into Between Private Parties..... 9

CONCLUSION..... 10

TABLE OF AUTHORITIES

PAGE NO.

CASES

Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) 4, 5

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 9

Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987) 3

City of New York v. F.C.C., 486 U.S. 57 5

Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 50 (1982) 4

Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n., 63 N.Y.2d 424, 433-434, 483 N.Y.S.2d 153 (1984) 7

Consol. Edison Co. of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99, 468 N.Y.S.2d 596 (1983) 4

Fermaglich v. Levine, 41 A.D.2d 10, 341 N.Y.S.2d 394, 402 (3d Dep't 1973) 4

Francis v. INA Life Ins. Co., 638 F.Supp. 117, aff'd, 809 F.2d 183 (2d Cir. 1987) 3

Honeywell v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981) 2

Linan-Faye Const. Co., Inc. v. Housing Auth. of the city of Camden, 49 F.3rd 915 (3d Cir. 1995) 3

Reliance Insurance Co. v. United States, 20 Cl.Ct. 715 (Ct. Cl. 1990) 8

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) 5

Sante Fe Engineers Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986) 8

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 5

MISCELLANEOUS

Clean Waters Act 8

ARGUMENT

(a) State Law is Not the Law of Decision to Interpret the Federal Regulation.

The respondent does not criticize or offer any opposition to the petitioner's position that federal common law should be the law of decision in this case based upon the national scope of the Federal Government's vast local grant procurement program; President Reagan's direction for uniformity in federal procurement grant programs; that the Federal Government's procurement policies are so settled under federal authority that they may not be defeated or limited by state law; that when the United States disburses its funds, it is exercising a constitutional function which should not be subject to diversified local disposition of the states, territories or of cities, towns or hamlets; that the language of the Federal Regulation's Changes Clause promises an equitable adjustment to a contractor; and that the broad scope of the Congressional mandate, that the Changes Clause supersedes all conflicting provisions of the contract, pre-empts the application of state law in this matter.

Despite the above, and without regard to the fact that there are no New York State appellate cases that interpret the Federal Regulation (only two lower court cases that applied federal common law to construe the exact Federal Regulation, see, Petition, FN 3 at 27), respondent is steadfast in its argument that the strict interpretation given to the standard clauses of its boiler plate contract by the New York courts should be applied to interpret the liberal Federal Regulation.

However, respondent's argument is not in accord with Honeywell v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981) wherein the Court of Claims states a different view:

> Plaintiff misunderstands the difference between interpretation of a contract and interpreting a regulation or statute. In case of the latter, the Court's duty is to effectuate the intent of the promulgators of the regulations or statute. [citation omitted] A contract clause is construed in order to give it the effect intended by both parties. These are mutually exclusive rules of construction. The fact that a regulation may be incorporated into a contract does not require a different rule for regulation interpretation.

Here the intent of the promulgators of the Regulation is codified in the Changes and Supersession Clauses, which set forth EPA's objective and policy, that the contractor "shall" be entitled to an equitable adjustment. Such policy supersedes all conflicting provisions of the respondent's contract, upon which it relies.

(b) If State Law is the Law of Decision Herein, There are No New York Cases that Construe the Federal Regulation and New York Would Look to and Apply Federal Common Law.

The City further advances New York law should apply as "there is extensive New York case law addressing

the interpretation of the contractual notice provisions". See, Respondent's Brief at 15.

However, the New York law that the City refers to is not the "precise" law interpreting the Federal Regulation. See, Francis v. INA Life Ins. Co., 638 F.Supp. 117, aff'd, 809 F.2d 183 (2d Cir. 1987), Petition at 26, but law addressing the standard boiler plate provisions of the contract which provisions conflict with and are contrary to the intent and purpose of the Federal Regulation. The City does not refute Perini's statement that there are no New York appellate cases that construe the precise Federal Regulation.

The holdings in the Linan-Faye Const. Co., Inc. v. Housing Auth. of the City of Camden, 49 F.3rd 915 (3d Cir. 1995) and Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987), cited by the respondent do not support its position. Such cases hold that where there is no state law that interprets a Federal Regulation, the state courts would look to federal common law to interpret the Regulation. The court in Linan-Faye noted that "if New Jersey law were to apply, New Jersey courts would look to...federal common law...." Id. at 922. The court in Brinderson noted, "the Supreme Court of Virginia, if called upon to construe or apply this federally mandated provision, would look to the existing body of precedents. That collection of precedents is federal...." Id. at 45.

Further, the respondent does not state what law the courts of New York would apply to construe a Federal Regulation. Contrary to its argument, if the courts of New York were called upon to interpret a Federal Regulation, the

courts, as did the two New York lower court cases, would look to federal common law, see, Fermaglich v. Levine, 41 A.D.2d 10, 341 N.Y.S.2d 394, 402 (3d Dep't 1973), ("with certain possible exceptions the rule in New York State is that our courts will give effect to the interpretations of a federal statute [given] by a Federal Court."); Consol. Edison Co. of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99, 468 N.Y.S.2d 596 (1983), ("where local laws prohibit what would be permissible under [federal] law...or impose "prerequisite additional restrictions...so as to inhibit the operation of the [Federal Government's] general law", federal common law should be applied.)

(c) The Contract Provisions Relied on by the Respondent are Pre-empted by the Regulation's Supersession Clause.

Respondent advances that its strict notice requirements are compatible with and do not conflict with the pre-notice requirements of the Federal Regulation and the pre-emptive effect of the Supersession Clause is applicable only when there is an irreconcilable conflict between the two provisions, citing to Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996). Such argument advances, in effect, that its contract provisions should be given equal standing with the Federal Government's regulation.

This position is contrary to this Court's comments in Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 50 (1982): "Cities are not themselves sovereign;

they do not receive all federal deference of the states that create them... the states' subdivisions generally have not been treated as equivalents of the states themselves." The respondent's argument that its contract provisions should be equally considered with the Federal Regulation is without merit.

Further, in Barnett, the pre-emption under consideration was based upon a clash between a federal and state statute, not upon an express supersession clause here present.

While an irreconcilable conflict may be a requirement for pre-emption under circumstances where a federal and state statute address the same issue, that is not the law when considering an express supersession clause.

As noted in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947), wherein the Court addressed a clash between a federal and state regulation concerning warehousemen, and the federal government had adopted a regulation reserving to itself exclusive control, the warehousemen "could not be required by a state to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act." See, also, City of New York v. F.C.C., 486 U.S. 57 cited in Petition at 24.

In Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991), this Court summarized the rule regarding pre-emption as follows:

> Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with,

or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent. Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute. Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress...touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. When considering pre-emption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Even when Congress has not chosen to occupy a particular field, pre-emption may

> occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," (citations omitted).

The respondent's standard provisions were pre-empted by reason of the expressed Supersession Clause and the presence of an irreconcilable conflict is not a condition precedent to pre-emption. See, also, Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n., 63 N.Y.2d 424, 433-434, 483 N.Y.S.2d 153 (1984).

In the instant matter, the Federal Government reserved to itself exclusive control by reason of the express Supersession Clause. The standard clauses of respondent's contract that require the petitioner to provide more and additional notices and to conform to other standards not required under the Federal Regulation are pre-empted. Pursuant to the Federal Regulation, a contractor must give notice of its intention to file a claim, "within 30 days after receipt of a written change order." Under the contract, the petitioner must give notice, within 10 days after commencement of any condition which is or may cause delay (Article 11), and further, within 5 days after the condition arises and then again 30 days thereafter (Article 27). Without regard to the difference in the number of days within which a contractor must file notice, notice under the Federal

Regulation is required within 30 days "after receipt of the written change order" while notice under the respondent's standard clauses is required when the condition occurred. In this matter, the petitioner, under the respondent's standard clauses, was required to notify the City approximately one to two years prior to the time when notice was required under the Federal Regulation. Pursuant to this Court's holding in Rice, the respondent cannot require the petitioner to do more or additional things, even though its requirements may be compatible.

(d) Delegation of Responsibility to Manage the Project Does Not Authorize the Respondent to Disregard the Changes and Supersession Clauses.

The respondent cites to provisions of the Clean Waters Act and the regulations issued thereunder delegating responsibility for the management of the project as authority for violating the Federal Regulation's provision that the petitioner "shall" receive an equitable adjustment and Congress' mandate that such shall supersede all conflicting provisions of the contract. The Regulation's delegation of responsibility to manage the project does not authorize the respondent to avoid the effect of other equitable remedies specifically provided for and expressed in the Federal Regulation.

The respondent relies on Sante Fe Engineers Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986) and Reliance Insurance Co. v. United States, 20 Cl.Ct. 715 (Ct. Cl. 1990),

aff'd, 931 F.2d 863 (Fed.Cir. 1991) for the proposition that "federal agencies in fact are free to place cost limitations on change orders [included in another federal regulation] issued pursuant to the Changes Clause." See, Petition at 20.

However, the respondent does not show how these cases stand for authority for the respondent, as opposed to the controlling federal agency, to place cost or other limitations on the Federal Regulation. It should further be noted that the revisions to the Changes Clause were not contained in another regulation but were effected by the direct amendment to the Changes Clause itself.

(e) Federal Common Law is Applicable to Interpret a Contract Containing the Federal Regulation Entered into Between Private Parties.

The City argues that Boyle v. United Technologies Corp., 487 U.S. 500 (1988) is inapplicable to this matter for, "unlike the defendant in Boyle, who was a Government contractor...Perini contracted with the City...." Respondent's Brief, FN 6 at 13.

However, the Boyle case, as here, involved an action between private parties involving a Federal Government contract. The court noted that "it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one--even though the dispute is one between private parties." 487 U.S. at 506. The fact that the City's procurement policy on federally funded projects increases the costs of construction to the Federal

Government requires the application of the principles held in Boyle in the instant matter.

CONCLUSION

Based upon the far reaching national effect of this matter it is respectfully requested that Perini's Petition for a Writ of Certiorari be granted.

Eli S. Cohn*
K. Richard Marcus
Counsel for Petitioner
McDonough Marcus Cohn Tretter Heller & Kanca, L.L.P.
3 Park Avenue
New York, New York 10016
(212) 779-9700

*Counsel of Record

by the Governor and, therefore, will apply within State waters of the Sanctuary upon the effective date of these regulations.

The following is the text of the March 20, 1997, letter from the Governor of Florida to the Secretary of Commerce. Per the Governor's request, the letter is followed by the text of the Resolution passed by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (Board of Trustees). The Resolution was adopted on January 28, 1997, and provides the basis for many of the items in the Governor's certification.

***32155** Lawton Chiles

Governor

State of Florida

Office of the Governor

The Capitol

Tallahassee, Florida 32399-0001

March 20, 1997.

Honorable William M. Daley, Secretary, United States Department of Commerce, Herbert C. Hoover Building, 14 Street and Constitution Avenue Northwest, Washington, DC 20230.

Dear Mr. Secretary:

On January 28, 1997, the Florida Cabinet and I, sitting as the Board of Trustees of the Internal Improvement Trust Fund, adopted a resolution to include state sovereign submerged lands

within the boundary of the Florida Keys National Marine Sanctuary (FKNMS). It is our intention to create a partnership with the National Oceanic and Atmospheric Administration (NOAA) for management under the provisions of the FKNMS Management Plan and the Memoranda of Agreement included in the management plan, with certain conditions to be applied to the portions of the sanctuary within Florida Territorial Waters. A copy of the resolution is enclosed. We request that the resolution be placed in the preamble to the final notice for the FKNMS regulations.

In accordance with subsection 304(b)(1) of the National Marine Sanctuaries Act and that resolution, the following terms are certified as unacceptable in state waters:

1. Sanctuary fees for allowed public uses unless first approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

2. Sanctuary emergency regulations unless and until first approved by the Governor. Accordingly, the following sentence shall be added to section 922.165 CFR as published January 30, 1997: "Emergency regulations shall not take effect in Florida territorial waters until approved by the Governor of the State of Florida."

3. Requirements for governmental entities within the state, including but not limited to the State of Florida and Monroe County, to provide funding for the implementation of sanctuary regulations or other actions.

4. Sanctuary fisheries regulations unless established by the Florida Marine Fisheries Commission following promulgation under the provisions of section 370.025(2), F.S. (1995), which requires public input and final approval by the Board of Trustees

of the Internal Improvement Trust Fund of the State of Florida. Accordingly, the following sentence shall be added to section 922.42 CFR as published January 30, 1997: "Any fishery regulations in the Florida Keys National Marine Sanctuary shall not take effect in Florida Territorial Waters until established by the Florida Marine Fisheries Commission."

5. Sanctuary regulation of discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, if the discharging or depositing is authorized under Monroe County land use permits or under state permits. Accordingly, 15 CFR section 922.163(a)(4)(ii), concerning prohibited activities, shall be amended to read as follows: "Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except those listed in paragraph (a)(4)(I) (A) through (D) of this section and those authorized under Monroe County land use permits or under state permits."

6. The implementation of any additional ecological reserves or any other type of zoning or regulation unless first approved by the Board of Trustees. Accordingly, the following provision shall be added to 15 CFR section 922.163 as published January 30, 1997: "(h) Any amendment to these regulations shall not take effect in Florida Territorial Waters until approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida;" and the following provision shall be added to 15 CFR section 962.164: "(f) Additional wildlife management areas, ecological reserves, sanctuary preservation areas, or special use areas, and additional restrictions in such areas, shall not take effect in Florida Territorial Waters unless first approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida."

7. Implementation of the management plan in its entirety unless the Co- Trustees agreement is amended to provide as follows:

a. The Florida Department of Environmental Protection (FDEP) employee who has been designated by the Secretary of FDEP and confirmed by the Board of Trustees shall represent the Board of Trustees as an equal partner to work in consultation with the Sanctuary superintendent for the oversight of Sanctuary operations.

b. The FDEP and NOAA shall manage the FKNMS through a cooperative partnership and consult on all management activities throughout the Sanctuary. The intent of this partnership is that the final resolution of any management issues resulting in policy conflicts between the state and NOAA shall be decided by the managing partners consistent with state and federal laws.

c. The state reserves the right to initiate proposed changes to the plan, and NOAA, if necessary, shall initiate the federal rule promulgation process required to make revisions to sanctuary regulations requested by the Board of Trustees.

d. Section 304(e) of the National Marine Sanctuary Act requires the Secretary of Commerce to review the management plan and regulations for the Sanctuary every five years, evaluate the substantive progress toward implementing the management plan and goals for the Sanctuary; especially the effectiveness of site-specific management techniques, and revise the management plan and regulations as necessary to fulfill the purposes and policies of the Act. When the management plan and regulations for the FKNMS are re-evaluated, the Secretary of Commerce will re-propose the management plan and regulations in their entirety and the State of Florida will have the opportunity to review the management plan and regulations, in their entirety, and indicate if any or all of the terms are

unacceptable, in which case the unacceptable terms shall not take effect in state waters.

Accordingly, the following provisions shall be added to 15 CFR section 922.160: "Section 304(e) of the NMSA requires the Secretary to review management plans and regulations every five years, and make necessary revisions. Upon completion of the five year review of the Sanctuary management plan and regulations, the Secretary will repropose the regulations in their entirety with any proposed changes thereto, including those regulations in subparts A and E of this part that apply to the Sanctuary. The Governor of the State of Florida will have the opportunity to review the re-proposed regulations before they take effect and if the Governor certifies such regulations as unacceptable, they will not take effect in State waters of the Sanctuary."

We also call to your attention the now erroneous reference in section 922.166(b)(2)(iii) to the Submerged Cultural Resources Agreement contained in Volume 1 of the management plan. We suggest striking that reference. The final agreement is that considered by the Board of Trustees on January 28, 1997 and executed by the signatory parties.

We believe that implementation of the plan provides balanced, common sense protection of this fragile, unique and endangered marine treasure and advances the state and federal commitment to jointly manage these resources. We look forward to that continuing relationship.

With kind regards, I am
Sincerely,
Lawton Chiles
LC/khw/mlp

Enclosure

cc: Honorable Frank Brogan
Honorable Bob Butterworth
Honorable Bob Crawford
Honorable Debbie Horan
Honorable Bob Milligan
Honorable Sandra Mortham
Honorable Bill Nelson

Resolution [omitted]

* * *

APPENDIX "2"

Excerpt from Brief of the United States, *United States of America v. Kane Fisher, et al.*, No. 97-5800, August 31, 1998, pp. 30-32.

* * *

C. The Sanctuary Act took effect when Congress designated the Sanctuary. – As Fisher concedes (Br. 28), in his previous appeal to this Court, a major contention was whether or not Congress' designation of the Sanctuary "took effect" when the Sanctuary Act was enacted or would be deferred until NOAA had issued regulations for the Sanctuary. This Court unequivocally held that the Sanctuary came into existence when the Sanctuary Act was passed. 22 F.3d at 268-268. Notwithstanding this holding, Fisher reasserts this argument in the instant appeal.

In our previous brief before this Court, we explained that the starting place for determining whether the Sanctuary has been established is the language of the Sanctuary Act itself. See Hallstrom v. Tillamook County, 110 S.Ct. 304, 308 (1989). That language speaks repeatedly in terms of immediate effect. In Section 5, the Sanctuary Act provides that the area described in the statute "is designated as the Florida Keys National Marine Sanctuary * * *." The Sanctuary shall be managed and regulations enforced under all applicable provisions of [of the MPRSA] as if the Sanctuary had been designated under such title." Sanctuary Act § 5(a) (emphasis supplied). The clear import of this language is reinforced by the presumption that statutes are to take effect immediately unless Congress clearly states otherwise. Gozlon-Peretz v. United States, 110 S.Ct. 840, 846 (1991).

Notwithstanding this Court's previous holding and the plain language of the Act itself, Fisher maintains (Br. 30-31) that the Act was meaningless until NOAA issued final regulations for the Sanctuary's management. Fisher bases (Br. 31-32) his argument on the fact that NOAA submitted its final

regulations for review to Congress. This review was intended, in part, to give Congress the opportunity to hold hearings on the Sanctuary's management. Although this Court previously held that NMSA did not require NOAA to submit these regulations to Congress, as a matter of policy NOAA did submit these regulations to Congress. Ultimately Congress did not hold hearings on these regulations although NOAA officials did meet with congressional aides regarding jet ski operations within the Sanctuary. See 62 FR 32154, 32158-159 (June 12, 1997).

The fact that NOAA submitted its regulations to Congress for review does not mean, as Fisher asserts (Br. 31), that the existence of the Sanctuary depended on Congressional action. To be sure, the 45 day review period set forth in 16 U.S.C. 1443 is intended to give Congress the opportunity to review a sanctuary administratively designated by the Secretary. This Sanctuary, however, was not administratively designated by the Secretary; it was created by Congress in a law passed by both Houses and signed by the President.[22] In other words, the law which established the Sanctuary had already been enacted and taken effect. Even if Congress now wanted to "veto" the Sanctuary, it could not do so except by enacting new legislation. See INS v. Chadha, 462 U.S. 919 (1983) (holding the so-called "legislative veto" unconstitutional).

In sum, Fisher's argument that the Sanctuary designated by Congress in 1990, may only take effect after NOAA has published regulations for the Sanctuary is without merit. There are sound legal and policy reasons why NOAA sends it management plans and regulations to Congress before they become legally enforceable. NOAA's responsible action in this regard does not mean, as Fisher asserts (Br. 31), that the Sanctuary did not take effect until 1997.

---

[22] See also U.S. Brief in Fisher v. United States, No. 92-4799, pp.22-39.

Supreme Court, U.S.
FILED
NOV 18 1999
CLERK

No. 99-594

In The
Supreme Court Of The United States

KANE FISHER AND SALVORS, INC., et al., Petitioners,
v.
UNITED STATES OF AMERICA, Respondent.

Petitioners' Reply Brief And Suggestion For Response By Solicitor General

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit,

---

WILLIAM VANDERCREEK*
*COUNSEL OF RECORD
W. SCOTT NEWBERN
Post Office Box 1328
Tallahassee, Florida 32302
Tel/Fax (850) 561-9147

COUNSEL FOR KANE FISHER, SALVORS, INC. AND MOTIVATION, INC.

No. 99-594

In The
Supreme Court Of The United States

KANE FISHER AND SALVORS, INC., et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit,

---

PETITIONERS' REPLY BRIEF AND SUGGESTION FOR RESPONSE BY SOLICITOR GENERAL

The Solicitor General on November 5, 1999, waived response to Petition, including the United States' answer to the critical issue: *Whether the Florida Keys National Marine Sanctuary Act requires submission of proposed rules and regulations, after opportunity for public input, to Congress and to the State of Florida before implementation.* The Solicitor General, of course, would be pleased to respond should this Court desire the answer.

The State of Florida's answer is set out in the Governor of Florida's certification to the Secretary of Commerce and resolution of the Florida Cabinet promulgated at 62 F.R. 32154, *et seq.* (June 12, 1997). The United States

(NOAA) accepted the objection and adopted changes for the public regulations duly codified in 15 C.F.R. § 922, *et seq.*

Unlike the Solicitor General, Petitioners have no authority to speak for the United States in answer to the critical question. Petitioners respectfully do submit that NOAA's 1997 actions and responses constitute an acknowledgement that proposed rules must be submitted. Petitioners further submit this acknowledgement should control over the contrary position taken by NOAA in its 1998 representations to the Eleventh Circuit (see Appendix to *Amicus Curiae* Brief in Support of Petition filed by Southeastern Fisheries, Inc. and Monroe Commercial Fishermen).

Unquestionably this Court has the full competence to resolve the issue whether the Sanctuary Act mandates submission of proposed rules. The answer is not only decisive to this case, it is critical to the ongoing processes emanating from the requirement that national marine sanctuaries, together with their rules and regulations, be re-evaluated every five years. 16 U.S.C. § 1434(e). The provisions providing for the right of public input would become meaningless if the Sanctuary Act provisions for submission of proposed rules were considered discretionary. Response by the Solicitor General on behalf of the United States would be most illuminating.

Respectfully,

WILLIAM VANDERCREEK
COUNSEL OF RECORD
Post Office Box 1328
Tallahassee, Florida 32302
Tel/Fax (850) 561-9147